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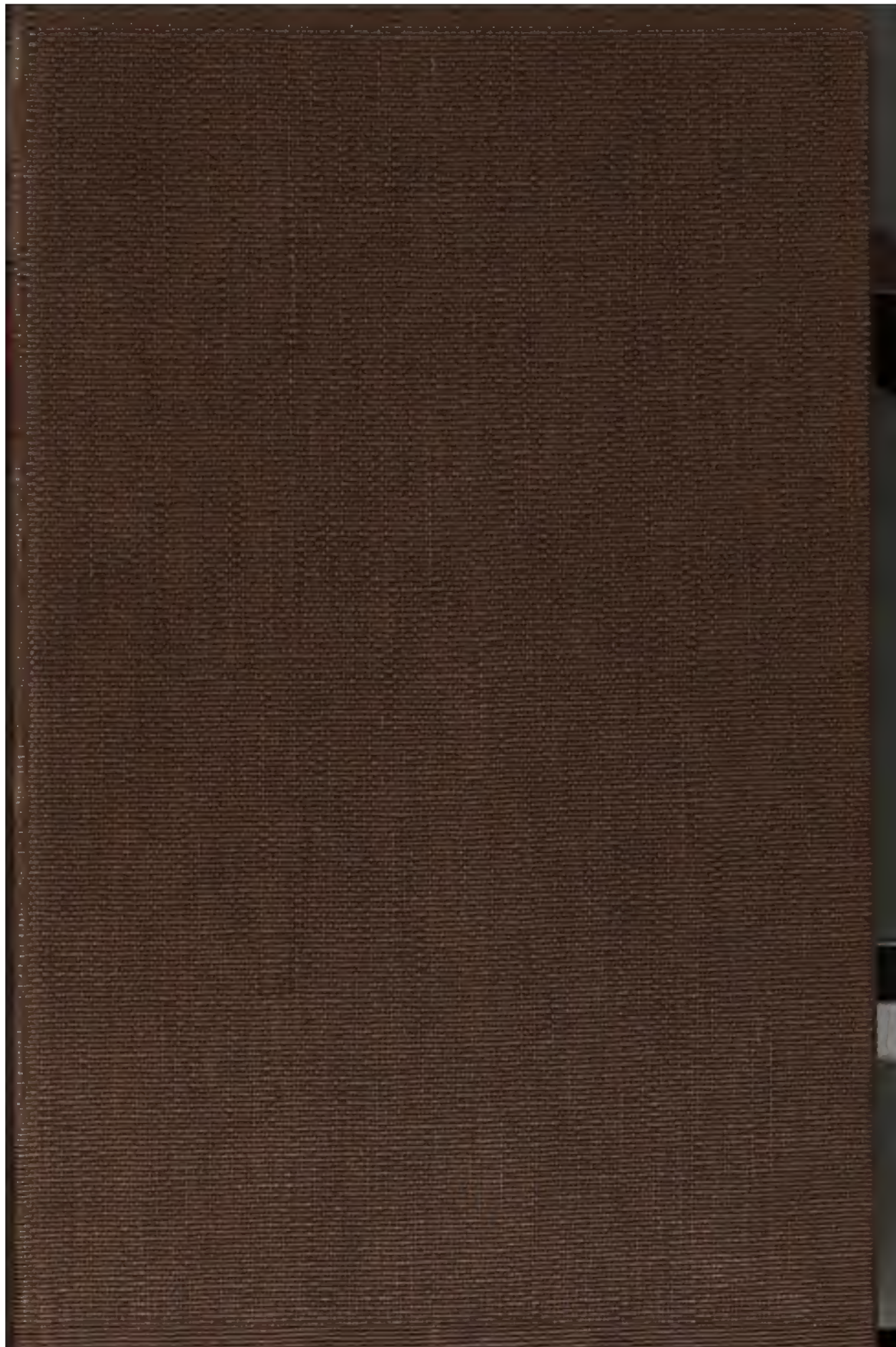
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REPORTS
OF
CASES IN BANKRUPTCY

DECIDED BY
THE LORD CHANCELLORS
LYNDHURST AND BROUGHAM,

THE VICE-CHANCELLOR,
SIR LANCELOT SHADWELL,

AND
THE COURT OF REVIEW.

By BASIL MONTAGU Esquire,
BARRISTER AT LAW.

WITH
A DIGEST
OF THE CASES REPORTED IN THIS VOLUME,
AND OF
THE CONTEMPORARY CASES RELATING TO BANKRUPTCY
IN THE OTHER COURTS.

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New-Street-Square.

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THESE Reports of the DECISIONS in BANKRUTCY in the COURT of REVIEW, in the LORD CHANCELLOR'S COURT, and in the HOUSE OF LORDS, will, with the assistance of Mr. BLIGH, to whom I am indebted for many valuable Reports in this Volume, be continued, and be entitled "MONTAGU and BLIGH'S REPORTS."

B. MONTAGU.

LORD CHANCELLOR.

**The Right Honourable JOHN Lord LYNDHURST resigned the
Great Seal in Michaelmas Term 1830.**

The Right Honourable HENRY Lord BROUGHAM and VAUX.

VICE-CHANCELLOR.

The Right Honourable Sir LAUNCELOT SHADWELL.

JUDGES OF THE COURT OF REVIEW.

The Right Honourable Sir THOMAS ERSKINE.

The Honourable Sir ALBERT PELL.

The Honourable Sir JOHN CROSS.

The Honourable Sir GEORGE ROSE.

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CASES

IN

BANKRUPTCY.

Ex parte ELSEE. — In the matter of JOYNER.

THE assignees had been allowed in their accounts, by the commissioners, 140*l.* 19*s.* for expences incurred by them as assignees in travelling. The petition prayed that this sum might be refunded.

V. C.
LINC. INN,
October 30,
1829.

Assignees are
not entitled to
travelling ex-
pences.

Mr. Sugden, Mr. Montagu, and Mr. Koe for the petition: —

By the 5 Geo. 2. c. 30. s. 33. it is enacted: “that the assignees shall produce fair and just accounts of all their receipts and payments touching the said bankrupt’s estate and effects; and in such accounts the said assignees shall be allowed and retain all such sum and sums of money as they shall have paid and expended in suing out and prosecuting of such commission, and all other just allowances on account of and by reason or means of their being assignee or assignees.” Upon this clause

3 Mont 1.
1 Dec 46 4
3 — 76 2

1829.

Ex parte
ELSER.In the matter
of

JOYNER.

it seems to have been settled, in *ex parte Bray*, 1 *Rose*, 144, that assignees could not charge for travelling expences. (a)

The words in the 6 Geo. 4. c. 16. s. 106. are not so extensive as in the 5 Geo. 2, as the former statute enacts only that “in such accounts the said assignees shall be allowed to retain all such money as they shall have expended in suing out and prosecuting such commission, and all other just allowances.”

It has been supposed that assignees, like trustees, ought to be allowed all expences incurred (b); but the analogy fails; for, in trusts, the trustees will be restrained by the vigilance of the cestuique trust, where the interest of each is of sufficient importance to interpose constant checks upon excess; but in bankruptcy the interest of each creditor being only to a dividend, it is seldom of sufficient importance to a creditor to induce him to trouble himself with the assignees accounts; and if the practice be allowed, of permitting assignees to charge

(a) In *ex parte Bray*, 1810, 1 *Rose*, 144, at the particular desire of the creditors in London, and for their security and satisfaction, *Lambert* went from London to Bishop Wearmouth, to attend the choice of assignees, and to be himself elected an assignee. He was elected one of the assignees, and charged the sum of 42*l.* for his expences from London to Bishop Wearmouth. Quære, as to the extent of this authority?

(b) See *Brocksope v. Barnes*, 5 *Madd.* 90, where the Vice-Chancellor says, “The trustee is

of course entitled to all reasonable expences which he may have incurred in the conduct of the trust, and requires no order for that purpose. But the general rule must be applied to him, that a trustee is not entitled to compensation for personal trouble and loss of time.” See also *Marshall v. Holloway*, 2 *Swans.* 453, and *ex parte Strange*, 1 *Mont. & Maca.* 31, where Lord *Lyndhurst*, under the authority of the 6 Geo. 4. c. 16. s. 106. directed that assignees should be allowed extra costs incurred by them in prosecutions for conspiracy and perjury.

for travelling expences, the estate will be used to defray costs incurred for fruitless journeys, or journeys in which the estate has no interest.

1829.

Ex parte
ELSEE.

In the matter
of
JOYNER.

Mr. *Rose*, Mr. *Bickersteth*, and Mr. *Jacob*, *contrà*:—

These expences were properly incurred, and are comprised in the terms “just allowances,” mentioned in 6 G. 4. c. 16. s. 106. In *ex parte Bray*, the allowance claimed was not for the travelling expences of an assignee, but to defray the expences of a journey to the place of election, in order to choose an assignee.

The VICE-CHANCELLOR: — I consider this case to be settled by the words of the statute, and the decision in *ex parte Bray*. The sum cannot be allowed to the assignee.

It was disallowed accordingly.

Ex parte HALL.

L. C.
Nov. 11,
1829.

THE day for the last examination was the 1st of September, before which day a petition, by the direction of the commissioners of the 14th list, was presented, to enlarge the time until the 20th of October. The petition was presented by the solicitor to the commission, in the name of the bankrupt, but without his consent. Before the 20th of October, the solicitor applied to the bankrupt, to consent to a further enlargement, which he refused; and, upon his refusal, the solicitor said, in anger, “I will have you sent somewhere you will not

The commis-
sioners cannot
apply for an
enlargement of
the time to
surrender.

1829.

Ex parte
HALL.

like to go." The bankrupt attended on the 20th; but only one of the commissioners was in attendance, as neither of the other commissioners had returned to London. Several creditors attended, but could not prove their debts. The single commissioner ordered an adjournment to be entered to the 9th of November, when they met, and took the usual fees. The bankrupt had been without his protection from 1st of September. The petition prayed, *inter alia*, that the commission might be renewed to other commissioners, who should receive the surrender.

Mr. *Montagu* and Mr. *Swanston* for the petitioner: —

As the commissioners have violated the law, and caused the name of the bankrupt to be used without his consent; as he has been threatened because he would not submit to a repetition of this abuse of the law; as he has been much injured by this act of the commissioners, not being able to obtain his certificate until he has passed his examination, and in his privilege, of having his certificate signed by a less number of creditors after the expiration of six months from the time of passing his examination, being affected; and as he has been obliged to apply to the Lord Chancellor for redress; the Court will not expose the bankrupt to these commissioners to administer justice. The commissioners admit all the facts, as they have not made any affidavit in answer, or instructed any counsel to appear on their behalf.

Mr. *Wakefield* appeared for the assignees and solicitor: —

He stated, that he was indifferent as to the renewal of the commission; but the use of the name of the bankrupt in the petition was mere form, as the petition might have been presented by the assignees in their own names.

CASES IN BANKRUPTCY.

5

The LORD CHANCELLOR:—The law is the contrary, and so settled in *ex parte Dayvie*, 1 *Glyn & Jameson*, 281.

1829.

—
Ex parte
HALL.

Mr. *Wakefield* then proposed to read an affidavit filed the evening before the day of hearing; to which Mr. *Montagu* objected, as the petition and the appointment for hearing had been served for more than seven days.

An affidavit filed the evening before the hearing, not admissible, if there was laches.

The Lord Chancellor would not permit the affidavit to be read, or the petition to stand over, without the consent of the petitioner, which was refused.

It was ordered that the commission be renewed to another list of commissioners; that the costs of enlargement should not be paid out of the estate; and that the commissioners should refund all fees received by them since the 1st of September. (a)

Ex parte HILL.

Nov. 11,
1829.

IN August a commission was renewed from the 14th to the 3d list. Upon the return of the commissioners of the 14th list to London in November, they said that the effect of the renewal was not the same as of a superseas. They, therefore, attended at a meeting which

A renewed commission transfers all the commissioners' authority to the new commissioners.

(a) During the argument it appeared that a summons, signed in blank by the commissioners before they quitted London, had been filled up by the messenger since their absence, and dated

on the 7th of November, when one of the commissioners was absent. The Lord Chancellor said, he would direct inquiries to be made respecting this improper act.

Blank warrants.

1829.

Ex parte
HILL.

they had appointed before they quitted London, and received a proof of debt, and audited the accounts, and took their fees.

This petition prayed the direction of the Chancellor.

The *Solicitor General* and Mr. *Montagu* for the petition stated, that the only wish of the assignees was to act as his Lordship might direct, and that the 3d list were wholly neuter, and did not interfere.

It was ordered that the fees received by the 14th list should be refunded; and that all future proceedings should continue before the 3d list; and that all the acts done by the 14th list, on the day when they met, were a nullity.



V. C.
LINC. INN,
Nov. 30,
1829.

If upon a petition to except to taxation, and which does not pray costs, an order to retax is made, the petition praying confirmation of the certificate of retaxation, may pray the costs of the original petition.

Ex parte SPURR. — In the matter of SYKES.

THE commissioners had refused to allow the costs of certain actions, which appeared to them to have been instituted without authority. The prayer of the petition was, that the petitioner might be at liberty to except to the said taxation of the said three bills of costs and disbursements, and that they might be referred to one of the Masters of the High Court of Chancery to tax the same, and that his Lordship would make such order in the premises as to his Lordship might seem meet.

His Honor the Vice-Chancellor referred it to the Master to tax the bill.

This was a petition to confirm the certificate on retaxation, and praying for costs, including the costs of the original petition.

CASES IN BANKRUPTCY.

7

Mr. *Rose* for the petition.

1829.

Mr. *Knight* and Mr. *Montagu* *contra* : —

Ex parte
SPURR.

In the matter
of
SYKES.

After the other questions are settled, the only remaining question is as to the costs of the original petition, upon which the rule is, first, that costs cannot be allowed, unless prayed; *ex parte Atkinson*, *Buck.* 215, where the Vice-Chancellor says: “The general rule in bankruptcy is, that you cannot have costs unless you pray them.” By this rule the practice of the Court has invariably been regulated. Secondly, costs are never given against a decision of the commissioners. If, indeed, the commissioners refuse to act, then costs may be paid out of the estate; *ex parte Fiske*, 1 *Mont. & Mac.* 93. But, in the present case, the commissioners acted and decided after deliberation; and, with a knowledge of the practice of the Court, the petition is framed, without asking costs.

The VICE-CHANCELLOR: — As costs are prayed in the last petition, I see no reason why the petitioner should not have costs.

Ordered accordingly.

Ex parte DAINTRY. — In the matter of BAYLEY.

V. C.
LINC. INN,
April 21,
1830.

PETITION by a mortgagee, praying that he might be entitled to certain fixtures. It was an appeal from the commissioners. The petition did not pray costs. The Vice-Chancellor referred it to the commissioners to enquire and certify whether they were fixtures, and

In general, costs cannot be allowed on a petition not praying costs.

B 4

2 Mont & Mac 38.

1830.

reserved costs. The commissioners certified in favour of the petition.

Ex parte
DAINTRY.

In the matter
of
BAYLEY.

A new petition was presented, praying a confirmation of the certificate, but did not pray costs.

The VICE-CHANCELLOR:—As the petition does not pray costs, the petitioner cannot have the costs of the inquiry, or of the petition to confirm the certificate.



V. C.

LINC. INN,
May 25,
1830.

Ex parte HARWOOD.—In the matter of TERRY.

THIS was a petition for a new trial.

An application
for the Judge's
notes, on a peti-
tion for a new
trial, is a motion
of course.

Mr. *Rose* and Mr. *Montagu* moved that an application might be made to the judge for his notes.

Mr. *Pepys* and Mr. *Knight* opposed this motion, upon the ground that a *prima facie* case ought to be established to warrant the application.

Mr. *Rose*:—It is settled that this is a motion of course. The question was some time since agitated before the Lord Chancellor, who said, that as there was a petition for a new trial presented, he should trust to the representation of counsel, without having the time of the Court twice occupied in discussing the merits.

The VICE-CHANCELLOR was of opinion, that as there was a petition in bankruptcy in Court, the application might be made, upon the responsibility of counsel, as a matter of course, without any statement of the merits.

3 Ref 318.

Montagu &
Deane & Co.

Ex parte HILL. — In the matter of ARNOTT.

PETITION to restrain the bankrupt from proceeding at law to dispute the validity of the commission, in which, it was alleged, he had acquiesced, by having applied for his protection, and having agreed with the assignees to purchase his estates, of which they were possessed as assignees.

Mr. *Knight* and Mr. *Koe* for the assignees.

Mr. *Rose* and Mr. *Montagu* for the bankrupt:—

The only remedy is by bill: a petition does not lie. There are certainly cases to the contrary (a); but the law was settled, upon a review of all the cases, by Lord *Eldon*, in *ex parte Glossop*, 2 G. & J. 268. In *ex parte Leigh*, 2 G. & J. 332, it was indeed held that a petition was the proper remedy; but there the case of *ex parte Glossop*, which, probably, had not then been reported, was overlooked. Admitting, however, that *ex parte Leigh* is to be considered an authority, it must not be assumed as a general authority, but limited to the particular case, in which it appeared that the bankrupt had, again and again, availed himself of the jurisdiction, and had presented petitions upon the ground of the validity of the commission.

But assuming that a petition will lie, there has not been any acquiescence. It has been repeatedly determined, that claiming a protection, by which a person who is bereft of property to pay his debts is protected

V. C.
LINC. INN.
March 29,
1830.

A petition lies to restrain a bankrupt from proceeding at law to supersede the commission. What amounts to an acquiescence?

1 Mont & Bl

1 Mont & May 2

4 Dec 26 33

(a) *Ex parte Grant*, Buck. 90. *Kirkpatrick v. Dennet*, 1 Sim. & Stu. 408. 1 G. & J. 300. *Ex parte Cullen*, 1 G. & J. 317.

2 Mont & May 2 115.

1 Ph 457.

1830.

—
Ex parte
 HILL.
 In the matter
 of
 ARNOTT.

from arrest for non-payment, is not an acquiescence. (a) Nor is his agreement to buy, that is, to protect his property, an acquiescence. In *Heane v. Rogers*, 9 B. & C. 578, it was held, that the bankrupt's having assisted the assignees in the sale of the property, and the surrender of a lease by the bankrupt to the lessee, by a notice in which he described himself as a bankrupt, was not an estoppel.

The VICE-CHANCELLOR :—It was decided in *ex parte Leigh*, the last case on the subject which came before Lord *Eldon*, that the Court has jurisdiction on petition. This I consider to be settled. The acts stated do not appear to me to amount to an acquiescence.

Petition dismissed.



V. C.
 LINC. INN,
April 8,
 1830.

ANONYMOUS.

The right to allowance does not apply to dividends declared before the present statute came into operation.

A COMMISSION had issued in 1822: the last dividend was in 1823. The bankrupt applied for his allowance under the present statute.

Mr. *Pepys* for the petitioner.

Mr. *Rose*, *contra*.

The VICE-CHANCELLOR said, that, after having conferred with the Lord Chancellor, he was of opinion that the right to an allowance under the 6 G. 4. c. 16. s. 128. does not apply to dividends declared before the statute came into operation.

(a) *Flower v. Herbert*, 2 Ves. *Goldie v. Gunston*, 4 Camp. 381. sen. 326. *Like v. Howe*, 6 Esp. *Heane v. Rogers*, 9 B. & C. 577. 20. *Clark v. Clark*, 6 Esp. 61.

Ex parte SMITH. — In the matter of WALKER.

V. C.

PETITION to stay a certificate, on the ground of the commission having been concerted.

LINC. INN,
March 30,
1830.

Mr. *Rose* and Mr. *Knight* objected, that this might be a good reason for superseding the commission, but was no reason for staying the certificate, to which the bankrupt was entitled, as the petitioner did not object to the validity of the commission.

A petition to stay a certificate because the commission is concerted, does not lie.

Mr. *Horne* and Mr. *Montagu* for the petition :—

The petitioner is not to be deprived of less because he might have asked more.

The Court will not allow a certificate where, when granted, it will be void ; as for *gaming*, or *bribery* ; nor when any of the causes exist which, after its allowance, would invalidate the commission ; nor where it has been obtained by the bankrupt having committed a fraud on the Great Seal. *Ex parte Williamson*, 2 *Ves.* sen. 249. *Ex parte Kennet*, 1 *Rose*, 331.

That the bankrupt shall remain liable to the commission which he has fraudulently procured to be issued, and that at least he is estopped from objecting to it, is quite consistent with this application, which is founded upon the maxim, that no man shall take advantage of his own wrong.

The VICE-CHANCELLOR : — As the petitioner has not petitioned to supersede, he does not object to the validity of the commission. It consequently follows, that the bankrupt cannot be deprived of his certificate on the ground that the commission is invalid.

Dismissed with costs.

2 Mont & Ag 233.

S Ad & Ell 870.

V. C.
LINC. INN,
March 29,
1830.

A third commission against a bankrupt who has not paid 15s. in the pound is void, and may be superseded on the petition of a person summoned to attend the commissioners as a witness.

Ex parte LANE. — In the matter of FOWLER.

IN November 1812, a commission issued against *Fowler* and *Austin*.

In November 1815, another commission issued against *Fowler* and *Green*. Under this commission a dividend of 1s. 4½d. in the pound was paid on *Fowler's* separate estate; but no dividend was paid on the joint estate.

In June 1820, *Fowler* was discharged under the insolvent act.

In April 1823, another commission issued against *Fowler*. No dividend was paid under this commission.

Fowler obtained his certificate under each commission.

In August 1828, a fourth commission issued against *Fowler*.

Lane, a solicitor, was summoned to attend the commissioners under the fourth commission, to be examined as a witness; and he presented this petition, on the ground that the commission was void at law, praying that the commission might be superseded, or that the commissioners might be restrained from examining him.

Mr. *Knight* and Mr. *Montagu* for the petition: —

It was virtually settled in *Till v. Wilson*, 7 B. & C. 684, that a commission against an uncertificated bankrupt is a nullity. In *ex parte Robinson*, 1 Mont. & Mac. 44, it was determined that a certificated bankrupt, under a second commission, where 15s. has not been paid, cannot be a petitioning creditor. And, in a late case before the Court of King's Bench, arising out of this bankruptcy, it was decided, that a third commission against a trader who has not paid 15s. in the pound

2 Mont & Mag 257

Dea e 5.

Dea 747. 268.

11 Mont 249.

276.

11 Mont & Mag 2432.

413

Dea e 26 376.

Ad & Ell 354.



under a second commission, is void at law. *Fowler v. Coster*, 10 B. & C. 427. (a)

The only question, therefore, is, whether a witness who is summoned can present this petition, upon which no serious doubt can be entertained. The Court will not permit its process to be used against law and justice. In *Perkins v. Proctor*, 2 Wils. 382, in an action against commissioners for a commitment under an illegal commission, the Court held that the commissioners were responsible. The Lord Chief Justice said: "In the case at bar we lay the superseding the commission of bankruptcy entirely out of the case, as if it had never

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LANE.

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of
FOWLER.

(a) In delivering the judgment of the Court of King's Bench, in *Fowler v. Coster*, Lord Tenterden, adverting to a second commission against an uncertificated bankrupt, said: "The opinions which have been given in other cases against the validity at law of such a commission are numerous, and of the highest authority. Lord Hardwicke, in the case *ex parte Proudfoot*, 1 Atk. 253: Lord Roslyn, in *ex parte Brown*, 2 Ves. jun. 67: Lord Eldon, in several subsequent cases, 15 Ves. 114; 15 Ves. 543; 16 Ves. 256. 473; 1 Rose, 156. 285; 2 Rose, 172. 319, have all stated, that a second commission, before a certificate was obtained under a first, was void at law. Lord Thurlow appears to have been of a different opinion, *ex parte Hollingworth*, 9th February 1793, Co. B.L. 501; and Lord Chief Baron Thomson and the Court of Exchequer, in a

recent case, *Butts v. Bilke* and another, 4 Price, 240, desired the question to be stated in a special verdict: but this Court, in the late case of *Till v. Wilson*, 7 B. & C. 684, upon a consideration of all the cases, decided that a second commission was absolutely void at law.

"We see no reason to depart from that decision; and we consider, that by the authorities above referred to, it is fully settled that the Lord Chancellor has no power, under the bankrupt statutes, to issue a commission for the purpose of distributing effects which are already vested in assignees under a prior commission, and that such commission is not merely nugatory, but void.

"A third commission against one whose effects have not paid 15s. in the pound appears to us to be equally void."

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been superseded at all. The commissioners had no more power to act under the commission of bankrupt against *Goodall*, who was a victualler, than if he had been a divine, a lawyer, or a physician. Although it may be thought hard to adjudge a man a trespasser in a case heretofore doubtful, yet the law cannot bend to particular cases; and it is more for the general utility to suffer particular hard cases, than to give usurped authority any effect at all; the hardship of particular cases is thereby most amply compensated to the public."

This Court, therefore, will not expose the commissioners to this peril, or a witness to the vexation of being sent to Newgate, and resorting to an action for redress, for the violation of the law under a commission, which the Lord Chancellor had no power to issue, and which, had he known all the circumstances, he never would have issued.

Mr. *Rose*, *contra*, contended, that a petition to supersede could not be maintained by a mere witness.

The VICE-CHANCELLOR:—I have no alternative, as the commission is void at law. Can I permit it to stand? Can I call upon the commissioners to act, or permit them or the party to be harassed? As the assignees under the former commission, and the bankrupt's representatives, have been served, this commission must be superseded. (a)

(a) *Ex parte Alexander*, May 9, under a second commission, under 1831. The Vice-Chancellor super- which fifteen shillings had not seded a third commission upon been paid. the application of the assignees

Ex parte MOENS. — In the matter of MAIDEN.

V. C.
LINC. INN,
Dec. 8,
1829.

A CREDITOR, resident at Rio de Janeiro, for the purpose of proving his debt, made an affidavit in the usual form, and sworn before "*Alexander John Heatherly Esq.*, His Britannic Majesty's Vice Consul at Rio de Janeiro," and certified by the consular seal. This petition, by the agent in London, prayed that the affidavit might be received by the commissioners.

Affidavit to
prove a foreign
debt must be
attested by a
notary.

2 Dec 16 37

Mr. *Pepys* for the petition :—

Although the bankrupt act (*a*) requires that the affidavit shall be sworn before a magistrate, and attested by a notary public, British minister or consul; yet by the 6 Geo. 4. c. 87. s. 20, which passed after the bankrupt act, it is enacted, "that it shall be lawful for any and every consul general or consul to administer, at any foreign port or place, any oath, or take any affidavit of any person or persons whomsoever, and also to do and perform, at such foreign port or place, all and every notarial act which any notary public could or might be required and is by law empowered to do within the United Kingdom of Great Britain and Ireland; and every such oath, affidavit, and every such notarial act, administered, sworn, had, or done by or before such consul general or consul, shall be as good, valid, and effectual, and shall be of like force and effect, to all intents and purposes, as if any such oath or affidavit or notarial act respectively had been administered, sworn,

(*a*) 6 G. 4. c. 16. s. 46. If a such creditor shall be residing, creditor "shall live out of Eng- and attested by a notary public, land," he may prove, "by affidavit British minister or consul." sworn before a magistrate where

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affirmed, had, or done before any justice of the peace or notary public in any part of the kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature." If this act were not applicable to this case it would be nugatory; and since the act has passed, affidavits so sworn are the foundation of proceedings in all courts of equity, and must extend to proceedings before commissioners of bankrupts.

Mr. Montagu contra :—

The only effect of the 6 G. 4. c. 87. s. 20. is to enable a consul to act as a magistrate so as to receive an affidavit; and assuming that a magistrate is for this purpose a master in Chancery, before whom the affidavit must be sworn in bankruptcy, and assuming that a vice consul is a consul within the meaning of this act, the oath has not been verified, as required by the bankrupt act, by a notary; which, although not required in ordinary proceedings before the Court of Chancery, where perjury would instantly be detected, is of great importance in bankruptcy, where the small stake may not be a sufficient object to induce any enquiry that may lead to detection, and where the nature of the proceeding requires every check to prevent imposition.

The VICE-CHANCELLOR was of opinion that the affidavit could not be received, and dismissed the petition.



Ex parte CHESTER. — In the matter of YATES.

V. C.
July 29,
1830.

AN order was made on the 1st of July, to refer an affidavit for scandal and impertinence: the report was not obtained in fourteen days. The question was, whether the order was to be considered as abandoned under the 12th of the new orders. (a)

Order 12. of the new orders does not apply to cases in bankruptcy.

Mr. *Whitmarsh* contended that the new order applied.

Mr. *Jacob* *contra*.

The VICE-CHANCELLOR: — The new order does not apply. Let the master proceed.

12 Ch 0561

Ex parte FAIRLIE and others. — In the matter of JOHN CHRISTIE, ROBERT CHRISTIE, and JOHN STEWART.

V. C.
LINC. INN,
Jan. 13,
1830.

IN February 1826, *Robert Christie*, one of the bankrupts, deposited with the petitioners, by way of equitable mortgage, the title deeds of certain real estates, part of

Where parties are indebted jointly, and enter into a covenant by which they promise, on demand, jointly and severally to pay, no demand is necessary in order to entitle the creditor to proceed severally against the parties; but where it was expressly sti-

(a) The order is as follows:— order shall be considered as abandoned, unless the party obtaining the order shall procure the master's report within a fortnight after the date of such order, or, &c." scandal or impertinence, the

pulated by three partners, that until a demand was made, an existing debt should remain a joint debt, and no demand was made previously to the bankruptcy: Held, that the debt was proveable against the joint estate, but not against the separate estates of the three.

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1 Mont & ay 2 396.

1 Mont & bli 226.

2 Dec & b 133

3 — 857

3 Mont & ay 27. 730. 740.

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his separate property, as a security for the payment of various bills which had been or were about to be accepted by the petitioners, for the accommodation of the bankrupts firm. In November 1826, the bankrupts being desirous to have these acceptances renewed, and being also largely indebted to the petitioners, upon a balance of account, *Robert Christie* executed a legal conveyance to the petitioners of the real estates before mentioned, upon trust that they should, when they thought proper, sell the same, and, after payment of costs and expences, repay themselves the joint debt then owing, and any additional debt that might accrue in their transactions with the petitioners.

The deed of conveyance also contained a covenant to the effect following: “ And the said *John Christie*, *Robert Christie*, and *John Stewart*, for themselves, their heirs, executors, and administrators, and each of them severally, separately, and apart from the other and others of them, did, for himself, his heirs, executors, and administrators, covenant, promise, and agree with the petitioners, their executors, administrators, and assigns, and also with each of them separately, his executors and administrators, that they the said *John* and *Robert Christie* and *John Stewart*, their heirs, executors, or administrators, or some or one of them, should and would, on demand, well and truly pay or cause to be paid to the petitioners, as such partners, or the survivors or survivor of them, his or their executors, administrators, or assigns, and also to each of them individually, all and every sum and sums of money, loss, costs, charges, damages, and expences for which provision was in part made by the trusts therein-before declared, and according to the true intent and meaning of the same trusts, but any debt existing previous to such demand should be and remain a debt in like manner as if no covenant

had been entered into for payment thereof, such covenant being intended only as an additional or collateral security."

The petition, after detailing these facts, stated the bankruptcy in December 1827, and that the petitioners had proved the balance due to them as a joint debt; but being advised that they were entitled under the said covenant to be considered as joint or separate creditors, they now prayed that their proof against the joint estate might be expunged, and that they might be permitted to prove against the separate estates of the bankrupts.

It was stated in the petition, that an actual demand, under the covenant, had not been made previously to the bankruptcy.

Mr. Horne and Mr. Knight for the petitioners: —

Without enquiring into the general law as to the necessity of notice, no notice was necessary in this particular case, as the sureties were themselves partners, and knew when their separate liability attached. There was a debt independent of demand; and the partners could not individually require a notice which it was not necessary to give to the firm.

Mr. Pepys, Mr. Rose, and Mr. Montagu for the respondents: —

The debt is joint, with a separate security from *Robert Christie*, and a covenant of the three severally to supply any deficiency, on demand; but no demand was made before the bankruptcy; and it has long been settled and has recently been confirmed, that although, upon a debt payable by a principal, on demand, no demand is necessary to entitle the creditor to maintain an action, yet that as against a surety a demand is necessary. With respect to the joint debt,

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therefore, due from the three principals, *J. and R. Christie and Stewart*, it may be admitted that no demand was necessary; but, as in their separate characters under the covenant, they could only become liable as sureties, that liability could not attach unless a demand was made upon each of them before the bankruptcy, *Birks v. Trippet*, 1 *Saunders*, 31; in the last edition of which case there is a note containing a long series of cases in confirmation of this doctrine. In *Rumball v. Ball*, 10 *Modern*. 38, which was an action of debt, on a promise to pay on demand, the court held that a demand was not necessary, because it was not a debt arising upon the performance of any condition, but a debt precedent to the demand. In *Clayton v. Gosling*, 5 *B. & C.* 360, which was an action on a note as follows: "On having twelve months notice, we jointly and separately promise to pay Mr. *J. Clayton*, or order, two hundred pounds for value received, with lawful interest:" it was held, that the debt was proveable, although no notice was given, because the note was expressed to be for value received, which was an acknowledgment of a debt due. And in *Rowe v. Young*, 2 *Bligh*, 465, *Bayley*, J., laid down the following rule: "When a man engages to pay upon demand what is to be considered his own debt, he is liable to be sued upon that engagement without any previous demand; and a tender or readiness to pay must come by way of defence from the defendant: but if he engage to pay upon demand what was not his debt—what he is under no obligation to pay—what but for such engagement he would never be liable to pay to any one, a demand is essential, and part of the plaintiff's title." (a)

That a member of a firm is, in his separate capacity, only surety for the joint debt, appears from *ex parte*

(a) See the note at the end of *Rowe v. Young*, *Bligh's Reports*.

Peacock, 2 G. & J. 27, in which it was decided, that a joint creditor, having a separate security from one of the firm, may prove against the joint estate without a previous sale of the separate security. The Lord Chancellor expressly said: "The separate estate can only be considered as surety for the joint estate."

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The VICE-CHANCELLOR:—It appears to me, from the words of the covenant, that it was intended by the parties that an actual demand should be made. Some distinct act was necessary to create a separate debt; and the parties stipulated that it should be on demand. It would be an extremely forced construction to hold that the transactions between the parties are equivalent to a demand.

Petition dismissed with costs.

From this decision an appeal was presented to the Lord Chancellor.

The *Solicitor General*, Mr. *Horne*, and Mr. *Knight*, for the petition of appeal, contended that the bankruptcy rendered an actual demand unnecessary, and that the parties, from the nature of their transactions, knew when their separate liability attached. They further contended that the transactions between the parties amounted to a demand.

L. C.
West. Hall,
May 4, 6.

Mr. *Pepys*, Mr. *Rose*, and Mr. *Montagu*, for the respondents.

The LORD CHANCELLOR:—In this case the question entirely depends on the construction of the covenant in the deed of November 1826. *J. and R. Christie*

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and Co. were indebted to *Bonham* and Co. *Bonham* and Co. agreed to accept bills, to be discounted by the bankers. Property belonging to *R. Christie* was conveyed, to secure in part the existing debt and damages, and any future debt. In the deed the covenant on which the present question depends is as follows: “and the said *John* and *Robert Christie* and *John Stewart* did thereby, for themselves, their heirs, executors, and administrators, and each of them severally, separately, and apart from the other and others of them, did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with *Fairlie* and Co., their executors, administrators, and assigns, and also with each of them separately, his executors and administrators, that they the said *John* and *Robert Christie* and *John Stewart*, their heirs, executors, or administrators, or some or one of them, should and would, on demand, well and truly pay or cause to be paid to *Fairlie* and Co. as such partners, or the survivors or survivor of them, his or their executors, administrators, or assigns, and also to each of them individually, all and every sum and sums of money, loss, costs, charges, damages, and expences for which provision was in part made by the trusts therein-before declared, and according to the true intent and meaning of the same trusts.”

It seems to be admitted, that if no alteration had been made by the covenant, or if it had been a joint covenant “that they should and would, on demand, well and truly pay or cause to be paid any debt that might be due to the firm,” under such circumstances an actual demand would not have been necessary. But it is contended, that, in consequence of the separate liability which was created by this covenant, an actual demand would be necessary before an action could be brought under the covenant. This must depend upon the meaning of the

parties, which can be correctly ascertained only by reference to the whole of the covenant. It proceeds in this way: "but any debt existing previous to such demand should be and remain a debt in like manner as if no covenant had been entered into for payment thereof, such covenant being intended only as an additional or collateral security." The expression, "any debt existing previous to such demand," would seem of itself to import an actual demand; but it does not stop there; the words are: "any debt existing previous to such demand should be and remain a debt in like manner as if no covenant had been entered into for payment thereof." From this it appears that an alteration was to be effected in the situation and liability of the parties by the demand, which must of course, therefore, mean an actual demand. I am of opinion, then, that the debt continued a joint debt, in its original form, until an actual demand was made, and then, upon that actual demand being made, it became a debt under the covenant.

If this be the true construction of the covenant, the next question is, has there or has there not, in this instance, been any actual demand? It was argued at the bar, that, supposing this construction of the covenant to be the correct construction, an actual demand had been made. It does not however appear to me, consistent with the facts which were stated, and which are contained in the petition, and verified by affidavits, that the transactions did amount to an actual demand. The parties had an absolute power to sell the property, whenever they thought right to do so, for the purpose of liquidating their debt. The accounts were stated between them; the property was sold; the produce was deducted from the debt, and the balance remained due. There was no demand of the original sum; there was no demand

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of the balance. I think that the judgment must be affirmed, with costs.

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and others.

The LORD CHANCELLOR afterwards stated that it was a fit case for argument, and dismissed the petition, without costs.

Delivered July 30 2.

L. C.

Ex parte HENCLIFFE.—In the matter of
HORWOOD.

July 30, .
1830. .

Confirmation of
ex parte Hor-
wood, 1 Mont.
& Maca. 169.

THIS was an appeal from the decision of the Vice-Chancellor, in *ex parte* Horwood, 1 Mont. & Maca. 169.

Dec 18 9.

In Dec 6 19.

Mr. Montagu, for the petition.

Mr. Rose, *contra*.

LORD CHANCELLOR:—He is trustee for the wife, and for the daughter. He is not in possession with the consent of the real owner. He is the real owner, but only as trustee. He is legal owner by assignment of the trust. He has the interest in the life of his wife, but the interest of the daughter cannot be affected by the bankruptcy. The order of the Vice-Chancellor must be affirmed, with costs.

2 Mont & Mag 2 354

212 to 227
top case 382

CASES IN BANKRUPTCY.

25

3 Dec 1857

Ex parte PERFECT and others.—In the matter of NEVILLE and SON and in the matter of BOWES.

V. C.
LINC. INN,
August 11,
1830.

NEVILLE and Son were manufacturers, and *W. Neville*, one of the firm, was a bleacher.

The indorsement of a bill has a lien upon property deposited with the drawee as security.

Bowes sent linen yarn to *W. Neville* to be bleached. *Bowes* drew two bills upon *W. Neville*, which he accepted, and it was agreed that he should hold the yarn as security against the bills. The yarn was invoiced to *W. Neville*, and the bills were expressed to be for value received in yarn.

Montagu 2
6 June 179

The petitioners were the bankers of *Bowes*, who indorsed the bills to them. The bills were dishonoured. *Neville* and Son and *Bowes* became bankrupts. *Bowes* was indebted to the petitioners, on his banking account, beyond the amount of the bills. The yarns were possessed by the assignees of *Neville*.

The petitioners prayed that the yarns might be sold, and the proceeds applied in payment of the amount due on the bills; and that the petitioners might prove for the deficiency, if any, against the estate of *Bowes* and *W. Neville*.

Mr. *Rose* and Mr. *Whitmarsh*, for the petitioners, cited *ex parte Waring*, 19 Ves. 350, 2 *Rose*, 182, and *Montagu's* Annual Digest, note 3 A., 51; 2 G. & J. 404, and *ex parte Parr*, Buck, 191.

Mr. *Horne*, for the assignees of *Bowes*, contended, that the petitioners having taken the bills without notice of any agreement between *Bowes* and *Neville* about the yarns being held as security, they could not have the benefit of that agreement; and that if a collateral agree-

2 Montagu 2 1830.
3 Dec 1857 206-224

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 and others.
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ment between drawer and acceptor was to enure *for the benefit* of a holder not privy to it, it must equally follow that the holder might have such a collateral agreement set up against him, which would be contrary to all the law as to bills of exchange.

Mr. *Jacob*, for the assignees of *Neville* and Son, contended that it ought to be ascertained whether the yarns were not in *Nevilles'* reputed ownership; the invoices and the bills purporting to be made as if there had been a sale to *Neville*, and not as if the yarns were sent for bleaching, and as a security only. And if the case of *ex parte Waring* were to be followed, and applied to the present case, the petitioners could not prove for the deficiency against *Nevilles'* estate, if they took the whole proceeds of the yarns. The primary purpose of the deposit was to indemnify the *Nevilles*, and the yarns could not be taken from them till they were completely indemnified. If *Nevilles'* estate had paid dividends on the bills, they would be entitled to reimburse themselves out of the proceeds. The principle of *ex parte Waring* was, that the party depositing was to be cleared from all liability; and it would be inconsistent with this to apply the yarns to the payment of the bill-holders in the first instance, leaving *Nevilles'* estate subject to a proof for the deficiency.

The VICE-CHANCELLOR thought the case was governed by *ex parte Waring* and *ex parte Parr*; and he thought the meaning of *ex parte Waring* was, that the depositaries were to be indemnified, but that they were to be indemnified by applying the proceeds of the security in payment of the bills as far as they would go, and that the holders were entitled to prove against both estates for the deficiency, if any; and His Honor made the order as prayed.

1 Mont & Ali 227-246.

2 Dec & h 133-595.

3 — 125-657.

1 Mont & Aug 2 124-154-396.

3 Bing h. 6. 487.

CASES IN BANKRUPTCY.

38th & Del 25. 1 Dec & h 411.

rel 2d 567. 1 Ph 234. Infra p. 116.

Ex parte The LANCASTER CANAL COMPANY.
— In the matter of DILWORTH, ARTHING-
TON, and BIRKETT.

V. C.
LINC. INN,
August
1828.

THE petition of “The Company of Proprietors of the Lancaster Canal Navigation” stated, that, by an act of parliament of the 32d of Geo. 3., for making and maintaining a navigable canal in the county of Lancaster, certain persons therein named, their representatives and successors, were incorporated by the name of “The Company of Proprietors of the Lancaster Canal Navigation,” and authorized, amongst other things, to appoint a treasurer or treasurers, from whom they were required to take a sufficient security, by one or more bond or bonds, in a sufficient penalty or penalties for the faithful execution by such treasurer or treasurers of such office.

That on the 6th of August 1822, *Dilworth, Arthington,* and *Birkett*, who were then bankers in co-partnership, were elected treasurers, and duly executed a joint and several bond, bearing date the 2d September 1822, by which they bound themselves, and every and each of them, jointly and separately, in the penal sum of 20,000*l.* To this bond was annexed the following recital and condition: “Whereas by an act of parliament, passed in the thirty-second year of the reign of his Majesty King George the Third, intituled ‘An Act for making and maintaining a navigable canal,’ &c. it was enacted, that it should and might be lawful to and for the company of proprietors of the said navigation, or the major part of them, at any general meeting assembled, and they were thereby authorized and required to nominate and appoint, by writing under their hands, a treasurer or

A, B, and C, being bankers in copartner-ship, were appointed treasurers of a corporate body, and executed a joint and several bond, in a penalty of 20,000*l.*, conditioned for the due performance by them of various duties as treasurers, and, especially, that they would, “when there- unto required by the said com-pany,” &c. pay all balances in their hands, &c. A commission of bankrupt issued against A, B, and C, who had at the time a large balance in their hands, as treasurers; but no demand under the bond having been made by the company before the bank-ruptcy:—Held, that there was not a sufficient breach of the condition to constitute a debt proveable against the sepa- rate estates of the bankrupts.

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Ex parte
 The
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 COMPANY.
 In the matter
 of
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treasurers; and that the said company of proprietors, and their successors, should and they were thereby required and directed to take a sufficient security, by one or more bond or bonds, in a sufficient penalty or penalties, from their treasurer for the time being of the monies to be raised by virtue of the act, for the faithful execution of such office: And whereas at a general meeting of the said company of proprietors of the Lancaster Canal Navigation, held at the canal office in Lancaster, on Tuesday the sixth day of August now last past, the above-bounden *John Dilworth*, *Robert Morley Arthington*, and *Robert Birkett*, were duly elected treasurers for the said company of proprietors, pursuant to the said act: And whereas the said company of proprietors have required the said *John Dilworth*, *Robert Morley Arthington*, and *Robert Birkett*, to give security for the due execution of the said office, in the above-written bond or obligation in writing, in the penal sum of twenty thousand pounds, conditioned as herein-after is mentioned: Now the condition of the above-written obligation is such, that if the above bounden *John Dilworth*, *Robert Morley Arthington*, and *Robert Birkett*, their heirs, executors, and administrators, shall and do, from time to time and at all times hereafter, use their and his best endeavours well and faithfully to collect, get in, and receive all such sum and sums of money as now are or hereafter shall be or become due and payable to the said company of proprietors, from the several proprietors of any share or shares in the said navigation, or from any other person or persons whomsoever, when and in such manner as they or he shall be directed or required by the said company of proprietors or their committee; and also shall and do, from time to time and at all times, truly and justly account for and pay and apply such sum and sums of money, and also all and every sum and sums which

shall be received by or come to their hands by virtue of the said office, so to be collected, got in, and received as aforesaid, unto such person and persons, and for such intents and purposes and in such manner as the said company of proprietors or their committee for the time being shall direct and require; and shall and do, during the time aforesaid, keep proper books, and enter and keep therein a true and perfect account of all their or his receipts and payments, and shall and do, upon request of the said committee, at all reasonable times, produce and shew unto the said company of proprietors or their committee such books of account, and all such vouchers as they the said *John Dilworth, Robert Morley Arthington, and Robert Birkett*, their executors or administrators, shall have in their or his possession or controul, in anywise relating to such accounts, and shall and do, on such request as aforesaid, deliver to such company of proprietors or their committee a duplicate or true copy of such books of account and vouchers; and if the said *John Dilworth, Robert Morley Arthington, and Robert Birkett* shall and do, when thereunto required by the said company of proprietors or their said committee, pay to them such balance or balances, sum or sums of money, as may be in his or their hands; and shall and do, during the time aforesaid, in all other things conduct and demean themselves and himself truly and faithfully in the said office of treasurer, according to the true intent and meaning of the said act of parliament, and of all other act and acts of parliament for making and maintaining the said Lancaster Canal Navigation, then the above-written obligation to be void."

The petition further stated, that *Dilworth* was the proprietor of 345 shares in the Lancaster Canal Company; and being, in September 1822, requested to give

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the company some further security for the payment to them of what might be owing from him as treasurer, and the due execution of his office, he agreed to assign and transfer 300 of such shares as a security, and that he accordingly transferred and assigned 300 of the said shares to the company, upon trust, in case they should not account for and pay such monies, then that the company should sell the shares, or a competent part thereof, and apply the proceeds in payment of such sums as should be received by *Dilworth*, *Arthington*, and *Birkett*, and should not be accounted for and paid over into or to the order of the committee of the company: That, at the time of the appointment of *Dilworth*, *Arthington*, and *Birkett*, as treasurers, it was expressly agreed between them and the committee, that *Dilworth*, *Arthington*, and *Birkett* should keep the account of the monies received and paid by them as treasurers, as a banking account, and that interest should be received or allowed by them, according as the balance of cash in their hands was to their credit or to their debit: That accordingly a banking account was opened at their banking house, by *Dilworth*, *Arthington*, and *Birkett*, as such treasurers; and that, according to such agreement, interest was charged in such account on the balance from time to time due thereon, and was credited or debited, according as the balance happened to be in their favour or against them; and that a half-yearly statement was made of such account, by *Dilworth*, *Arthington*, and *Birkett*, up to the 1st of January 1826, when 7,653*l.* 5*s.* 6*d.* was then due to the petitioners.

The petition then stated, that in February 1826 a commission of bankrupt was issued against *Dilworth*, *Arthington*, and *Birkett*; that at the issuing of the commission there was due to the company the sum of 8,703*l.* 15*s.* 5*d.*; and that the petitioners had applied to

prove their debt against the separate estates of the bankrupts, which was refused by the commissioners, because there had not been any demand for payment before the bankruptcy.

The petition prayed, that a proof against the separate estate might be admitted.

Mr. *Rose*, Mr. *Montagu*, and Mr. *Duckworth*, for the petition : —

The Lancaster Canal Company are entitled to prove against the separate estate of the bankrupts, although no actual demand was made upon the bond previously to the commission issuing. The want of a demand is not an objection, because the bankruptcy interfered to obstruct it; and the parties whose acts prevented notice cannot be permitted to urge, by way of objection, an omission caused by themselves. But, independently of this, interest was paid, or at least acknowledged and forborne, before the commission; and which gives the petitioners a right of proof. *Ex parte Downman*, 2 G. & J. 85 & 241; *Clayton v. Gosling*, 6 B. & C. 360; *ex parte Elgar*, 2 G. & J. 3. The acknowledgment of interest is evidence of a virtual demand, and that the parties dealt with the amount claimed as an immediate debt. A breach of one of the conditions of the bond is sufficient to give a right of proof. *Ex parte Rowlatt*, 2 Rose, 416. Besides, this is a contingent debt within the meaning of the 6 Geo. 4. c. 16, s. 56., and proveable as such. (a)

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(a) 6 Geo. 4, c. 16, s. 56. — the issuing of such commission, “ That if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are

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Mr. *Sugden*, Mr. *Knight*, and Mr. *Geldart*, for the assignees :—

The questions are, first, what is the construction of the bond in regard to the penalty, and the legal rights and remedies under it? and, secondly, has the dealing between the parties altered those rights and remedies, so as to give a title to prove, which would not have otherwise existed under the bond itself? Upon the first question no doubt can be entertained: it is not a mere bond for a debt due, but a security for the faithful performance of the office of treasurer. It raises an obligation, and not a debt. The bond recites that the security was given in pursuance of the act of parliament, and requires no less than seven things to be done by the obligors, which are all specified in the condition. In ordinary cases the condition is comprized in one sentence, and one breach is a breach of the whole condition: but we are not unwilling to admit, that if a breach of any part of this condition could be shewn, there would be a debt proveable. But there was, in fact, no positive breach, and therefore no debt arose under which a right of action accrued prior to the commission. There would, indeed, be no breach, unless notice had been given, or demand made; for this was the condition annexed to the seven things required by this bond to be done.

Between the right of action and the right of proof

hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have

happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends, provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

there certainly exists some difference; and it does not necessarily follow, that because parties have no right of action, they have, therefore, no right of proof; but undoubtedly the general rule is, that the right of proof is limited to cases where there is a right of action, and the decisions to the contrary can only be regarded as exceptions. In both the cases cited, of *ex parte Elgar* and *ex parte Downman*, there was an existing debt, but the payment was deferred. The debt was not created by but existed previously to, and independently of, the notes. Here there was no debt prior to the bond; there is a penalty, but no certain debt, until breach of the condition. It is necessary, therefore, for the petitioners to prove some neglect by the bankrupts: but this they cannot do; for it is admitted that no demand was made, and that nothing was neglected by the obligors until the bankruptcy. In *ex parte Downman*, 2 G. & J. 85, the Vice-Chancellor was of opinion that there was no debt proveable; and, although his decision was reversed, 2 G. & J. 241, it would be unreasonable to assume the case as an authority to dispense with the necessity of demand, where, as here, no debt existed previously to the security being given.

With respect to the second question, the petition states that a banking account was opened, and interest charged on the account, and the balance, from time to time, credited or debited with interest. The monies, therefore, received by the treasurer, were, even if payment had been required, paid, according to the direction of the committee, by the treasurer to the bankers, which is virtually the same as if the money had been paid to another banker.

It was urged, indeed, upon the authority of *ex parte Elgar* and *ex parte Downman*, that the payment,

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or rather this acknowledgment of interest in account, created a sufficient obligation to entitle the petitioners to prove; but it must be remembered, that in these cases the securities expressly provided for the payment of principal and interest, and that interest was actually paid. There was an irresistible presumption, therefore, that notice had been given. Here the bond does not provide for interest, and it cannot be said that the payment or acknowledgment of interest in account is an admission of a debt due under the bond. On the contrary, it only proves a new engagement, independent of the bond, to allow interest on the banking account.

The bond provides for the faithful discharge of the duties of treasurers by the bankrupts, and for nothing more.

The banking account is evidence of a superadded engagement, which was joint, for the disposition of the monies received, and the allowance of interest.

With respect to the argument, that this is a contingent debt within the 6 Geo. 4. c. 16. s. 56., it is sufficient to say, that a contingency means, not that which must happen, but that which may or may not happen. Thus a debt payable on the death of A is not contingent; but a debt payable on the death of A, if he survive B, is contingent.

Mr. *Rose* in reply : —

The objection, that the bankrupts discharged their duties as treasurers, and their obligations under the bond, by paying all sums received by them into a banking account kept by themselves, however that account might be recognized by the company, is altogether unreasonable, and would have afforded no answer to an action at law on the bond, if such an action had been brought

against them before the bankruptcy. It ought not, therefore, to prevail now against the petitioner's right of proof under the commission.

The argument, that this is not a contingent debt within the meaning of the 56th section, because it did not at the time of issuing the commission depend upon any uncertain event, would, if successful, unnecessarily limit the meaning of this remedial clause. There was a contingency as to the time of payment, if there was nothing more ; and such a contingency is within the fair interpretation of the act.

The VICE-CHANCELLOR : —

This is not a money bond, but a joint and several bond for the performance of certain duties, on the part of the obligees, as treasurers of the Lancaster Canal Company. It will not be necessary, however, to decide the case upon the question, whether notice ought or not to have been given before the bankruptcy, because another difficulty presses upon my mind. Under the bond, the bankrupts were, as treasurers, jointly and also severally liable to account, but in their banking transactions, and especially in the banking account, to which, with the express sanction of the company, they paid all sums received by them as treasurers, they were treated by the Lancaster Canal Company as persons who were from time to time held, jointly, and only jointly, liable as debtors for the balances in their hands. This is apparent, because the account is kept on the principle common in the country, that interest was to be charged ; and this seems to have been submitted to on both sides.

This dealing, therefore, between the company and the bankrupts, waived the bond as respects the separate liability of the latter. The interest was only payable under a separate and distinct contract. It cannot be con-

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tended, that the bond was given to make the bankrupt separately liable, in respect of a subsequent and independent joint act, to the agreement in question. I am, therefore, of opinion, that the bond cannot be considered as giving any right of proof against the separate estate of the bankrupts.

From this decision an appeal was presented, and was heard this day; together with a supplemental petition, which stated that, upon hearing the petition before the Vice-Chancellor, an objection to the proof was taken for the first time, and which served as the ground of His Honor's judgment: that *Dilworth, Arthington, and Birkett*, having received, as treasurers, the monies belonging to the company, had paid them over to themselves, as bankers, and thereby satisfied the conditions of the bond; but that, in point of fact, the banking account was opened before the bond was given; and that *Dilworth, Arthington, and Birkett* did not make any alteration in the mode of keeping the account, either before or after the bond was executed: that *Dilworth, Arthington, and Birkett* never received or paid any monies, except as treasurers, and did not receive or pay any monies as bankers, or make out any account between themselves and the petitioners, except as treasurers: that the monies were always paid out by orders drawn by the company on the bankrupts, as treasurers, who in account debited themselves with many sums of money, as paid by them, which they in fact never received or paid, merely because they kept the account, not as bankers, but as treasurers: that, as treasurers, all the tonnage receipts of the canal company, and all sums of money which the company borrowed on mortgage, pursuant to the powers contained in the several acts of parliament for making and maintaining the canal, appeared

in their accounts, which would not have been the case in a mere banking account; and more particularly, that the collector of the company, who received the tonnage duties, paid over or accounted for the whole amount thereof to the treasurers, although the course of business in fact was, that whenever the collector had, from time to time, collected money, and required the whole or any part thereof for the current expenses of the company, he took the same from the sums *in transitu*, and paid only the remainder to the treasurers.

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The *Solicitor General* (Sir *William Horne*), Mr. *Rose*, Mr. *Montagu*, and Mr. *Duckworth* for the petition: —

The question is, whether the petitioners, the obligees in this bond, are entitled to prove against the separate estate of the bankrupts. The objections to the proof are, first, that no demand was made before the bankruptcy, which is a question of law; secondly, that the condition of the bond was not broken, which is a question of fact.

As to the first point, in an ordinary case, it is clear that a previous request is not necessary. The commencement of an action is a sufficient demand in courts of law, and has been always so held since the case of *Birks v. Trippet*, 1 *Saund.* 31. (a) And in bankruptcy the commission is as much a demand as an action at law. The question was argued at considerable length before Lord *Lyndhurst*, in *ex parte Fairlie*, (*ante*, p. 17,) where his Lordship decided, that, in general, when the security is joint and several, a previous demand is unnecessary, and that it must be a case of exception, arising out of the nature and terms of the security, which the present case is not, to render a demand necessary.

(a) See *ante*, p. 20.

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With respect to the second point, that the condition of the bond was not broken, it must be observed, first, that in fact the monies were not paid over by the treasurers to the bankers; and, secondly, that, even if such payments had been made, they would not amount in law to a discharge of the bond.

The monies received were not paid over by the treasurers to the bankers. The treasurers, who have various duties to perform, must of course be paid for their services, either by a fixed salary or by fees, or by the advantages resulting from the possession of the company's funds. The last was the mode of remuneration adopted, and led to the selection of bankers to be treasurers, with whom the substance of the agreement was, not that the money should be paid over to them as bankers, but that they should keep the monies received and paid by them, as treasurers, on the principle of a banking account; that is, that they should pay to the company three per cent. upon cash in hand; and this is clear, upon the evidence before the Court, by which it also appears that the three bankrupts were regularly appointed at a general meeting of the court of proprietors, held in pursuance of the act of parliament; that they received all sums of money as treasurers; that they made entries in their books of sums received by the collectors, although not actually paid to them or passed through their hands; that they kept distinct accounts of dividends, claimed and unclaimed; that they paid the dividends to the respective proprietors; that they kept a deposit account distinct, as part of the treasurers' accounts; that they paid as treasurers, not upon any banker's cheque, but by an order of the committee; and that there were not two distinct accounts, the one as treasurers, the other as bankers, but only one account kept by them as treasurers. This mode of dealing was

said, in the court below, to be the same as if the payments were made to other and distinct bankers. The answer, however, is obvious. Upon payment to other bankers, the treasurers would have parted with possession of the property, which, in the present case, they retained. But, secondly, supposing the money to have been paid to the bankrupts as bankers, by virtue of a parol agreement, this would not amount to a discharge of the bond at law; for a specialty cannot be discharged by simple contract: nor can it be discharged in equity; for there is no equity to deprive a creditor of the benefit arising from his own vigilance; or a trustee of his right to elect whether he will proceed against the joint or separate estate. There would not be any such equity, even if the bond had been executed before the agreement; but from the evidence, it is in fact clear, that it was executed afterwards. (a)

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(a) It was expressly sworn by Mr. Crewsdon and Mr. Wakefield, bankers, that the accounts were treasurers', and not bankers', accounts; that on the 19th of February 1822, Mr. Dilworth was, upon the resignation of Mr. Audread, appointed treasurer; in March 1822 Mr. Arthington and Mr. Birkett joined Mr. Dilworth in partnership as bankers; on the 6th of August 1822, Dilworth and Co. were appointed treasurers; on the 2d of September 1822, the bond is given, with a separate security by Dilworth. It appears from the accounts with the treasurer, that the said Canal Company, pursuant to a power contained in one of their acts of parliament, sold some land to one Francis Har-

ling, for 25*l.*, and took from him property of equal value; so that the transaction amounted to an exchange, and no money actually passed between him and the company. But, in conformity with the aforesaid mode of keeping the treasurers' accounts, Dilworth, Arthington, and Birkett credited the Canal Company on the one side of the account; and, having received an order from the committee, they discharged themselves by a similar sum, to the account of Francis Harling, and by virtue of an order, in the following form:—

“ Lancaster.—At a meeting of the Canal Company, ordered, that the treasurers pay S. Gregson the sum of .”

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The appellants further submitted, as in the court below, that this debt was proveable as a contingent debt under the 6 Geo. 4, c. 16, s. 56.

Sir *Edward Sugden*, Mr. *Knight*, and Mr. *Geldart* for the assignees : —

In the course of the argument on behalf of the appellants, it was attempted to be contended, that the bankrupts, as treasurers, were not joint treasurers, and that, independently of the bond, there exists no joint debt. The fallacy of this is at once apparent. The bankers of any individual are his joint bankers, and, if they fail, he can only have a joint proof. And here, independently of the bond, there exists nothing but a joint debt.

The company, had they been content to follow the plain course contemplated by the act of parliament, would have taken a simple bond, which would have answered all the useful purposes of this special security. Adverting, however, to its frame and object, it is most material to observe, that, at the time when the bankrupts accepted the office of treasurers, and executed the bond, there was nothing due from them to the company. The bond is conditioned for the faithful performance by them of their duties as treasurers, and not for securing any actual existing debt. There was, in fact, no pre-existing debt. The different duties are carefully enumerated in the condition; and it will be observed, that in each case there is an express stipulation for previous notice. It is natural, indeed, to suppose that such was the intention of the parties. The obligees were bankers, and it would have exhibited great want of ordinary and prudent caution had they executed any security that could be put in force against them, without previous notice and request made. According to the express

words of this bond, a previous requisition was necessary. Will the law prevent such a condition from having its intended effect? When there is a pre-existing debt, we admit that a demand is not necessary; but here there was no precedent debt, and a demand was, therefore, essential to the plaintiff's title. *Birks v. Trippet*, 1 *Saund.* 31; *Rumball v. Ball*, 10 *Mod.* 38; *Clayton v. Gosling*, 5 *B. & C.* 360; *ex parte Elgar*, 2 *G. & J.* 1; *ex parte Downman*, 2 *G. & J.* 85 & 241; *Rowe v. Young*, 2 *Bligh*, 465.

Notwithstanding the additional facts adduced on the supplementary petition, it is clear that there was a banking account kept in pursuance of a separate and independent contract. The bankers advanced money to the corporation, and interest was allowed on both sides of the account, according to the stipulations agreed upon. In the bond there is not one word that relates either to the advance of money or the payment of interest: these transactions arose out of the banking account. On the part of the respondents, it is not denied that there is a debt due from the bankrupts, independently of the bond; but then it is necessarily a joint debt, and must be proved as such. *Ex parte Fairlie* was the only case cited in support of the separate proof claimed under this bond; but if that decision be at all applicable it is against the appellants, for the Lord Chancellor held, that a previous demand was necessary independently of this. The bond, in that case, was a money bond, and there was a pre-existing debt, whilst here there was no pre-existing debt, and the bond was for the performance of duties. A demand, therefore, and a breach, previously to the bankruptcy, are necessary allegations, and ought to have been proved as part of the plaintiffs' title.

In opposition to the claim to prove as a contingent debt, the same argument was relied upon, as in the court

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below ; and the case of *ex parte Eagle*, 1 *Mont. & Maca.* 422, was cited, in which it was decided that a debt on a contingency was not proveable, if incapable of valuation by the commissioners.

The LORD CHANCELLOR : —

This is a case of considerable importance. It is an appeal from the decision of the Vice-Chancellor, disallowing the proof claimed to be made by the Lancaster Canal Company, in respect of a joint and several bond, under which the petitioners have elected to prove against the separate estates of the three bankrupts. The particular point on which my judgment will be founded does not appear to have been in the immediate contemplation of the Vice-Chancellor when he disposed of this case ; and there seems to be some doubt as to the extent to which it was pressed upon his consideration. It is, however, a most material question, being, in fact, whether any debt is proveable by the company under this commission against the separate estates of the bankrupts.

The bond in which the proofs are tendered was executed by *Dilworth*, *Arthington*, and *Birkett*, for the due performance by them of the duties of treasurers of the Lancaster Canal Company. The condition expressly requires that they “ shall, from time to time and at all times hereafter, use their and his best endeavours well and faithfully to collect, get in, and receive all such sum and sums of money as now are or hereafter shall be or become due and payable to the said company of proprietors, from the several proprietors of any share or shares in the said navigation, or from any other person or persons whomsoever, when and in such manner as they or he shall be directed or required by the company of proprietors or their committee ; and shall and do, from

time to time and at all times, truly and justly account for and pay and apply such sum and sums of money, and also all and every sum and sums which shall be received by or come to their hands by virtue of the said office, so to be collected, got in, and received as aforesaid, unto such person and persons, and for such intents and purposes, and in such manner as the said company of proprietors or their committee for the time being shall direct and require; and shall and do, during the time aforesaid, keep proper books, and enter and keep therein a true and perfect account of all their or his receipts and payments; and shall and do, upon request of the said committee, at all reasonable times produce and shew unto the said company of proprietors or their committee such books of account, and all such vouchers as they the said *Dilworth, Arthington, and Birkett* may have in their possession or controul, in anywise relating to such accounts; and shall and do, on such request as aforesaid, deliver to such company of proprietors or committee a duplicate or true copy of such books of account and vouchers."

So far this certainly cannot be considered a money bond: it only provides for the due performance of certain official duties. The remainder of the condition sounds more like a money bond; but this is not, I think, material. It proceeds thus: "And if the said *J. Dilworth, R. M. Arthington, and Robert Birkett*, their executors and administrators, shall and do, *when thereunto required by the said company of proprietors or their said committee*, pay to them such *balance or balances or sum or sums of money* as may be in his or their hands; and shall and do, during the time aforesaid, in all other things conduct and demean themselves and himself truly and faithfully in the said office of treasurer, according to the true intent and meaning of the said act of parliament, and of all other act and acts of parliament for making and

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maintaining the said Lancaster Canal Navigation, then the above-written obligation to be void," &c.

Some years after the execution of this bond, *Dilworth*, *Arthington*, and *Birkett* committed acts of bankruptcy, and the present commission issued; but it is not alleged, or even pretended, that any request was made to them by the company of proprietors or their committee before the bankruptcy, or consequently that there was any refusal on their parts. Under these circumstances, there was not, in my opinion, any such breach of the conditions as would constitute an existing debt, and entitle the company to prove under the bond.

I also think that this cannot be considered a contingent debt within the meaning of the 6 Geo. 4, c. 16, s. 56, because there was no existing debt; and it has been already determined by the Court of King's Bench that there must be an actual debt, dependent on a contingency, to give a right of proof under the claim in question. In an ordinary case, it is familiar to us all that an actual request is not necessary, and that, notwithstanding the common allegation of *sæpius requisitus*, the bringing of the action is admitted to be a sufficient demand. This has long been the clear and settled law of the Court, as appears from the well known case of *Birks v. Trippet*, which was decided in an early part of the reign of Charles the Second. The same doctrine was recognized on appeal in the late case of *Rowe v. Young*, 2 *Bligh*, 365.

I am of opinion, therefore, that if the obligors had sued upon this bond, it would have been necessary for them to aver and prove a demand; and I can readily believe that country bankers would have hesitated to have entered into such conditions, without the protection afforded them from the necessity of making a demand previously to any proceeding to enforce the bond.

The petitioners have not made out such a case as entitles them to prove against the separate estates of the bankrupts, and the judgment of the Vice-Chancellor must therefore be confirmed, although upon grounds different from those adjudged by His Honor. (a)

Appeal dismissed.

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JOHN CROSS STARKEY and *William Starkey* being indebted to the petitioners, both by bond and notes, carrying interest, entered into a written agreement for admitting *William Whiteside* into partnership, as a dormant partner; and subsequently, on the 20th July 1820, an indenture was executed between *John Cross Starkey* of the first part, *William Starkey* of the second part, and *William Whiteside* of the third part, by which, after reciting that the *Starkeys* had for several years carried on the trade of brewers, in partnership, the parties mutually covenanted and agreed to become partners for ten years, from the 24th of July 1820; and further agreed, that the trade should continue to be carried on at the brewhouse in Little Pulteney Street;

J. C. S. and W. S., carrying on business as brewers, in co-partnership, admitted W.W. as a dormant partner. It was stipulated by deed that the stock and effects of the old firm, including the plant, &c. and book debts, should form part of the capital stock of the new copartnership; that W.W. should be paid 10 per cent. on the capital advanced by him, and should not otherwise interfere. The busi-

(a) See *Carter v. Ring*, 3 Camp. 459.

ness was carried on as before, in the names of J. C. S. and W. S. only, until the new firm became bankrupt. Upon petition of several creditors of the old firm, some of whom had notice of the dormant partner, it was held, that all the personal chattels of the new firm were within the order and disposition of J. C. S. and W. S., and ought to be administered in the bankruptcy as the separate estate of the two.

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that the capital joint stock of the copartnership should consist of the said brewhouse and the buildings belonging thereto, *together with the plant, fixtures, vats, tuns, casks, engines, machinery, utensils, and other effects then in and about the said brewhouse and buildings; and also of the malt, hops, beer, and other stock in trade, and book debts and effects belonging, due, or owing to the said copartnership joint trade lately carried on by the said J. C. Starkey and W. Starkey; and also of all the leasehold messuages, public houses, and hereditaments specified in a schedule to the said indenture, late the copartnership property of the said J. C. Starkey and W. Starkey; and also of all other freehold, leasehold, and copyhold messuages and public houses which the said J. C. Starkey and W. Starkey had lately contracted to buy; and of all other the public houses which, during the continuance of the copartnership, should be purchased in the joint names of the said J. C. Starkey and W. Starkey; and also of the sum of 24,000*l.* to be brought into the copartnership by the said William Whiteside, in two sums of 20,000*l.* and 4,000*l.* And it was further agreed, that the firm of the copartnership should be “Messieurs Starkey;” and that all buyings, sellings, receipts, payments, bills of parcels, letters, and other affairs and transactions, should be conducted, written, signed, and entered in the joint names of the said J. C. Starkey and W. Starkey alone; and that the said William Whiteside should not in any manner interfere with the management or carrying on of the said copartnership trade, nor receive any monies due or to become due to the copartnership, or use the name of the firm in drawing bills, &c.*

The deed then provided for the payment to Whiteside of 10 per cent. per annum on his capital of 24,000*l.*, in lieu of all profits, and for the repayment of the capital itself, at the termination of the partnership, in lieu of all demands on the partnership stock and effects.

No provision was made in the deed as to the debts owing by the *Starkeys* at the time of the formation of the new partnership. The deed was executed by *Whiteside* whilst an infant, but was afterwards confirmed by him, on his coming of age, by a deed, dated the 2d of March 1821.

On the 18th of April 1826, a commission of bankrupt was issued against *J. C. Starkey* and *W. Starkey*; and, on the discovery of the partnership with *Whiteside*, a commission was issued against the latter, in June 1826, and annexed to the former commission.

The petition stated the above facts, and that, upon the formation of the new partnership, the debts due to the *Starkeys* were not entered in any new books; that the accounts were kept, as before, in the names of the *Starkeys*; that interest on the debts due to all the petitioners, and part of the principal of some of the debts, had been paid out of the funds of the new copartnership, but that *Whiteside* was not privy to any such payment. The petition further stated, that *A. B.* and *C. D.*, two of the petitioners, were, from the first formation of the new copartnership, aware of its existence, but that the other petitioners were ignorant of it; that before the commission had issued against *Whiteside*, *A. B.*, one of the two petitioners referred to, proved against the joint estate of the *Starkeys*, and that all the other petitioners had proved against the estate of the *Starkeys* only since the commission had issued against *Whiteside*; that two dividends had been declared, of 1s. 6d. and 2s., on the joint estate of the three partners; but that there were no assets for a dividend on the joint estate of the *Starkeys* only. (a)

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(a) The whole of the statements contained in the petition were admitted by the assignees, excepting the last.

was joint estate of the *Starkeys* to the amount of about 1,000*l.*, but this was not dwelt upon in the argument.

It appeared, in fact, that there

CASES IN BANKRUPTCY.

0. The petition prayed that the petitioners might be allowed to transfer their proofs from the joint estate of the *Starkeys* to the estate of the *Starkeys* and *Whiteside*, and be paid a dividend on their respective debts rateably with the joint creditors of the new firm; or else that the debts, utensils in trade, and other chattels of the said copartnership might be declared to form part of the joint estate of the *Starkeys* only, and the value of them be made good out of the joint estate of the three remaining undivided.

Mr. *Knight* and Mr. *Turner* for the petition :—

Upon the formation of the copartnership of the *Starkeys* and *Whiteside*, *Whiteside* was, to all intents and purposes, a mere dormant partner. He placed his money out at a rate of interest which would have been usurious, had he not assumed the character of a partner; but he was not entitled to any share of the profits of the trade, as such, nor to any part of the stock of the partnership on its termination. There may, perhaps, be some difficulty in the form of the petition, but the questions to be submitted for the opinion of the Court have been agreed upon by the parties, and seem to resolve themselves into two :—

1st, Whether all the personal chattels belonging to the firm, both before and after the new partnership, are not within the statutes of the 21st *Jac.* l. c. 19. and 6 *G.* 4. c. 16. § 72.?

2dly, Whether there has not been an adoption by the three, of the debts due from the two?

1. The cases of *ex parte Enderby*, 2 *B. & C.* 389, and *Smith v. Watson*, 2 *B. & C.* 401, have decided that the partnership property is, as against the dormant partner, in the reputed ownership of the apparent proprietor. In *ex parte Dyster*, 2 *Rose*, 256, Lord *Eldon* intimated an opinion to the same effect, and expressed his dis-

approbation of the decision of the Court of Exchequer in *Coldwell v. Gregory*, 1 *Price*, 129. The knowledge of some of the parties that *Whiteside* was a partner will not vary the case. This was recently decided in *Hickenbotham v. Groves*, 2 *C. & P.* 492 (a), where furniture was held to be within the statute of *James*, although several persons dealing with the bankrupt knew that it was not his property.

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The case arising out of the bankruptcy of *Hurst* and *Robinson*, which was lately decided in this Court, may, perhaps, be cited on the other side; but there, although the new partner had not been admitted until within a month or two of the bankruptcy, yet he had, after his admission, appeared openly and ostensibly as a partner; and it was, therefore, held by your Honour, that the stock formed part of the joint estate of the new firm. But even in that case the debts due to the original partners were held not to have become part of such joint estate, but to have remained within their order and disposition. It may be said that in the present case some of the petitioners were aware of the existence of the partnership between the *Starkeys* and *Whiteside*; but the question is not whether one or two individuals were aware of it, but whether it was openly declared to the world.

2d. Interest was paid on the debts for several years, out of the funds of the new partnership; which has been held to be an adoption of them, and brings the case within the rule referred to by Lord *Eldon* in *ex parte Peele*, 6 *Ves.* 602. Some of the petitioners were aware of the existence of the new firm, and, therefore, assented to such adoption.

Mr. *Rose* and Mr. *Wood* for the assignees: —

There is much difficulty in the form of this petition.

(a) Cited under head of "Reputed Owner," 1 *Mont. & Maca.* 480.

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The VICE-CHANCELLOR:— I must consider the case as if the points were raised upon three petitions.

For the assignees :—

The petitioners are individual creditors ; they do not appear on behalf of themselves and other creditors, and yet they call upon the Court to decide between the doubts expressed by Lord *Eldon*, the decision of the Court of Exchequer, and the *obiter dicta* of the Court of King's Bench, as to whether or not there exists at this moment any commission against the three bankrupts, and whether or not the joint creditors of the three are to be entitled to any dividend. For if it be contended that the whole of the partnership property is to be considered as the joint estate of the *Starkeys*, by the operation of the statute of *James*, to what can the commission against the three be applied ? We do not rely on the case of *Hurst and Robinson*, where the addition of an *s* to the first name of the firm rendered the new partner an ostensible partner ; but we contend that it has never yet been decided that the share of a dormant partner, who continues in the firm up to the time of the bankruptcy, and against whom, as well as the acting partners, a commission issues, is to be considered, in the distribution of the estate, as forming part of the joint estate of the ostensible partners only.

In this case, the stipulated capital of 24,000*l.* was paid by *Whiteside*. Certain trusts were declared of that sum by the deed of partnership, and it formed a part of the capital of the three partners. Any person becoming a creditor, subject to the formation of the new partnership, might have brought an action against the three. Why should he be deprived of his right of proof in the event of bankruptcy ? The questions which have arisen, where the dormant partner has been solvent, as to whether or not his interest would not then fall within the

statute, is perfectly distinct from the question as to the administration of the estate between the different classes of creditors. But in either case the observations of the Chief Baron in *Coldwell v. Gregory*, 1 Price, 129, will not readily admit of an answer. He says: "The bankrupt and defendant were actually partners in the goods in question. It is a very different case where there is no partnership between the bankrupt and the person claiming to be interested, otherwise there would be an end of what are called sleeping partnerships altogether, which are now carried on to so great an extent in this country. If under the statute, wherever joint property is taken by the assignee of a bankrupt under a separate commission, you deprive a solvent partner of his property, with what is he to pay the partnership debts, for which he is liable, notwithstanding his effects have been seized under the commission?"

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If it be asked what is the share of the dormant partner? we answer, that the share to which the statute can be applicable is only the share of the surplus to which he is entitled after payment of the debts due from the copartnership. The acting partners are only the agents of the dormant partner; and there is also the character of a trust, the fund being vested in the acting partners for the benefit of the copartnership, and, in consequence, for the benefit of the creditors of the three. In cases of dormant partnership, creditors have an option of proving either against the separate estate of the acting or the joint estate of all the partners. But of what use is such an option, if the creditors of the acting partners are entitled to sweep away the whole estate? In every case cited there has been a solvent partner, and the cases are rightly decided upon that distinction. In *ex parte Enderby* the partnership had been dissolved, and the remaining partner was allowed to carry on the business for a year and a half after the dissolution. That case,

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therefore, fell clearly within the principle of *ex parte Ruffin*, 6 *Ves.* 128, and *ex parte Williams*, 11 *Ves.* 6, but has no bearing on the present question. The case of *Smith v. Watson*, 2 *B. & C.* 401, contains several *obiter dicta* on the point, but the case itself was decided on another ground.

As to the second point, which has been raised rather inconsistently with the first, not only is there no agreement in the deed that the debts of the partnership of the *Starkeys* shall be paid by the new firm, but *Whiteside* is admitted not to have been privy to any payment of interest or principal. *Ex parte Peele*, 6 *Ves.* 602, was not the case of a dormant partner, nor did Lord *Eldon* there refer to such a case. Besides, there is no assent on the part of the creditors to the transfer of their debt. Those who did not know that *Whiteside* was a partner could not assent. *Ex parte Williams, Buck*, 13, is a strong case to shew that express agreement between the partners to transfer the debts from an old to a new firm will not let in the creditor who has not assented, on the ground that he could not bring an action on such agreement.

Mr. *Knight*, in reply :— Lord *Eldon* expressed his dissent to the decision in *Coldwell v. Gregory* as long since as in 1815, and it has since been completely overruled by the cases of *ex parte Enderby* and *Smith v. Watson*.

The VICE-CHANCELLOR :— Is there any case in which, all the parties having become bankrupts, the statute of *James* has been held to apply ?

Mr *Knight* :— We submit that that can make no difference. The property, having been left in the apparent ownership of the two, must be distributed as their estate. It is quite clear that the debts, at least, which were originally due to the two, must be held to

be their property. There was no transfer of them by the deed of partnership which could take them out of the ownership of the *Starkeys*.

With regard to the form of the petition, we apprehend that, where there is a dormant partner, the creditor has his option of proceeding against either of the estates; and we, therefore, pray in the alternative; and we shall be entitled to shift our proof according as the Court shall determine that the joint estate of the *Starkeys* is to be increased or diminished.

The VICE-CHANCELLOR:—At the time when this case was argued I thought that some other cases might be found besides those which were cited by counsel. I do not, however, find that there are any. The opinion expressed by Lord *Eldon*, in *ex parte Dyster*, and by the Judges of the Courts of King's Bench and Common Pleas, render it very difficult for me to say that the joint creditors of the *Starkeys* are not entitled to consider the personal chattels, alluded to in the petition, as forming part of their joint estate. Unless, therefore, the parties disagree as to any particular items, let the order be, That they are to be considered as forming part of the joint estate of the two *Starkeys* at the time of the bankruptcy; and that the petitioners are at liberty to transfer their proofs.

Ordered accordingly. (a)

(a) The following is the order: as the joint estate of the said
 “ I do think fit to declare that *John Cross Starkey* and *William*
 the personal chattels forming the *Starkey*, under the statute of
 partnership estate of the said *John* 6 Geo. 4, c. 16, s. 72, on the
Cross Starkey, *William Starkey*, ground that such personal chat-
 and *William Whiteside*, at the tels were, at the time of the said
 time of the bankruptcy of the bankruptcy, in the order and dis-
 said last-mentioned parties, ought position of the said *John Cross*
 to be considered and distributed *Starkey* and *William Starkey*.”

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April 21.

V. C.
LINC. INN,
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1829.

Petition to supersede, presented in the lifetime of the bankrupt, ordered to stand over, on his death, until his personal representatives, or those entitled to take out administration, were served.

Ex parte LEWORTHY.—In the matter of Sir
WALTER ROBERTS, Bart.

THIS was a petition to supersede the commission presented in the lifetime of the bankrupt, who had died intestate.

Mr. *Rose* objected that the petition could not be heard until the personal representatives of the bankrupt were served.

Mr. *Horne* and Mr. *Teed*, for the petition, stated, that the bankrupt had died intestate, and that no person had taken out administration. They submitted, therefore, that as there was no personal representative to serve, the objection ought not to prevail.

The VICE-CHANCELLOR said he was of opinion that the petitioner could not be heard until the personal representatives, or at least those entitled to take out letters of administration, had been served. Their interests might be materially affected by superseding the commission.

Petition ordered to stand over.



1 Feb 24 192.

Ex parte CALDECOTT.—In the matter of WHITE
and METCALFE.

L. C.
LINC. INN,
Jan. 14,
1830.

MR. FROWD, the solicitor of Mr. Beeston, a creditor, had been summoned by the commissioners to attend, and produce a mortgage deed of certain leasehold premises, which the bankrupt White had executed to Mr. Beeston previously to his bankruptcy, and which Mr. Beeston had deposited with Mr. Frowd. (a)

Under a commission against a bankrupt mortgagor, the commissioners have authority, by the 6 G. 4, c. 16, s. 33 & 34, to enforce from a mortgagee of the bankrupt's property the production of his mortgage-deed.

Upon his examination by the commissioners, Mr. Frowd was required to produce the deed, to which he objected, saying: "I refuse to produce it, upon two grounds: the first is, that I have a lien upon the mortgage deed, and the leases therein referred to, to the extent of 1,600*l.* or 1,700*l.*, and that I have a right to retain it until that lien is satisfied; the second ground is, that, independently of this lien, I hold it, and have always held it, as solicitor for Mr. Beeston, the mortgagee; and, under the advice of my counsel, I am informed, as solicitor, it is my duty to refuse the production and inspection. For these two reasons, therefore, I now refuse the production.

The rule that a purchaser for valuable consideration, without notice, cannot be compelled to discover his title-deeds, does not extend to the mortgage or purchase deed itself.

" Q. What is the nature of the lien you claim?

" A. As solicitor for Mr. Beeston in a very heavy suit, in replevin, about 1,200*l.* or 1,300*l.*, and 500*l.* perhaps, besides, for costs, and heavy sums paid."

On a subsequent day Mr. Frowd again attended the commissioners, and was examined as follows:

" Q. The commissioners being of opinion, after argument and consideration, that they are authorized to

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2 Feb 25 9

11 Feb 25 10

2 Feb 26 64

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(a) See *ex parte Beeston*, 1 Mont. & Maca. 244.

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require the production of the mortgage deed, and that such deed ought to be produced to them, as being necessary to the disclosure of matters which they are authorized to inquire into, you are now required to produce it accordingly.

“ A. I refuse to produce it, for the reasons I have stated in my former examination.”

Upon this refusal, the commissioners executed a warrant of commitment against Mr. *Frowd* for not producing the deed; but Mr. *Frowd* was not taken into custody, in consequence of an order of the Lord Chancellor, made, on consent of counsel, that the execution of the warrant should be suspended until an opportunity was afforded of bringing the question under the consideration of the Court.

This petition was, in consequence, presented by the assignees, praying that Mr. *Frowd* should produce the deed, or that the order restraining the execution of the warrant of commitment should be discharged.

It was stated, in the petition, that the assignees had an action then standing for trial against Mr. *Beeston*, to recover various sums paid to him by the bankrupts, which were alleged to be fraudulent preferences, and that the production of the mortgage deed was material for the support of the plaintiff's case.

Mr. *Rose* and Mr. *Macarthur*, for the petition : —

1. The first ground upon which Mr. *Frowd* rests his refusal to produce the deed is, that he has a lien upon it for costs due to him, as a solicitor, from his client, the mortgagee. This objection, however, cannot prevail. In *Furlong v. Howard*, 2 *Scho. & Lef.* 115, Lord *Redesdale* expressly decided, that although a solicitor may have a lien on a deed for his costs, yet if his client is bound to produce it for the benefit of a third person, the solicitor

must do the same. The right of lien, in such a case, can only exist as between the solicitor and his client. Thus Lord *Eldon*, in *Fenwick v. Reed*, 1 *Mer.* 114, intimated his opinion, that an attorney, having title deeds of his client in his possession, is bound to produce them, if the principal could have been called upon to do so. The possession of the attorney in such a case is, in fact, the possession of the client; and accordingly, in *Brassington v. Brassington*, 1 *Sim. & Stu.* 455, a solicitor, who refused to allow a deed in his possession to be proved, on behalf of the plaintiff, because he had a lien on it for costs due from the defendant, was ordered by the Vice-Chancellor (Sir *John Leach*) to produce the deed, at his own expence, and to pay all the costs consequent on his refusal.

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2. The second ground relied upon by Mr. *Frowd*, and which may be thought in some degree inconsistent with the first, where an adverse lien is claimed against his client, is, that he holds the deed as solicitor of the mortgagee, and that, on his behalf, and for his protection, it is his duty to refuse the production of it. This objection, however, raises directly the more important questions, whether the assignees of a bankrupt mortgagor are entitled to inspect the mortgage deed, and whether the commissioners can compel the mortgagee to produce it? In support of the objection, it was urged before the commissioners that a purchaser for valuable consideration, without notice, cannot be compelled to discover his title deeds, and that this is a rule frequently and solemnly recognized both in courts of law and courts of equity. But, on the part of the present petitioners, there is no intention to dispute the existence of such a rule, or to question its propriety: they only contend that the rule was never extended to the purchase deed itself. This deed it is necessary to plead in bar to the

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discovery sought; *Salkeld v. Science*, 2 *Ves.* sen. 107; *Harrison v. Southcote*, 2 *Ves.* sen. 395, where Lord *Hardwicke* said, in giving judgment on a plea to a discovery of title deeds and writings: "First, in respect of the discovery, the defendant has not indeed pleaded to the discovery of his own purchase deeds; nor can any purchaser do so, for he must set them out in order for his own title." In *Aston v. Aston*, 3 *Atk.* 302, the same distinction is stated between the purchase deed and the title deeds; and in *Walwyn v. Lee*, 9 *Ves.* 24, where there was a plea to a bill for discovery and delivery of title deeds, by a tenant in tail in possession, against a defendant claiming to be mortgagee under deeds executed by the plaintiff's father, the mortgage deeds were recited at length in the plea. (a)

A mortgagee is a purchaser *pro tanto*, and without doubt within the rule applicable to purchasers for valuable consideration. But that rule only entitles him to say: "You, the mortgagor, represented to me that you had a perfect title to the premises comprised in the deed, and all the necessary evidences of that title, and upon the faith of this assurance I advanced you money on mortgage. It would be unconscientious in you to look into the title deeds, which you represented to be complete, with the view of discovering faults and defeating the security; but lest such should be your object, I will not, until I am repaid, consent to produce them." To the mortgage deed itself, however, it is evident that the principle of the rule does not apply. This deed specifies

(a) The plea is stated by deeds and writings, the purchase Mr. *Beames*, "Elements of Pleas" p. 341. "Upon a deed must be excepted, for it is pleaded." *Mitford* on Pl. in Equity," p. 341. "Upon a plea of purchase for a valuable (3d edit.) p. 225. See also *Sugd.* consideration, to discovery of Vend & Purch. (8th edit.) p. 767.

the terms and stipulations of the contract, the sum advanced, the time for which it is lent, the rate of interest, and a description of the property pledged, with other particulars, which should always be accessible to the contracting parties and their representatives, and without an inspection of which the mortgagee cannot know his right to redeem. In ordinary cases a counterpart remains in the possession of the latter; and it can excite no surprise, therefore, that the question has been seldom agitated. But by a case reported in *Mosley*, p. 246, it appears that Lord *King*, after a decree *nisi* for foreclosure, directed that the plaintiff should give the defendant a copy of the mortgage deed, at the defendant's charge, but would not oblige him to produce the title deeds; and in 2 Ca. & Opin. 52. it is expressly stated, that although a mortgagee is not compellable to produce the title deeds, the mortgage deed itself must always be open to the inspection of the mortgagor. (a)

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From these authorities, and the recognized practice of the Court, it cannot be doubted that there is a clear distinction between the title deeds and the mortgage deed, and that a mortgagor, or his personal representative, may obtain by bill a discovery of the mortgage deed. It only remains, therefore, to be considered,

(a) "And it is understood that a mortgagee is not compellable to produce the title deeds before he has actually received his money; for otherwise, under pretence of repayment, the mortgagor may look into the title deeds with a view to discover faults and defeat the security; which puts him in the character of mortgagee, and without which he cannot resist the production of the title, must always be open to the inspection of the mortgagor, that he may know his right to redeem." 2 Cases and Opin. 52. See also *Coventry's* edition of *Powell on Mortgages*, 935.

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whether the assignees of a bankrupt mortgagor, in whom the interest of the mortgagor vests, immediately, by the effect of the bankrupt laws (*Lloyd v. Llander*, 5 Madd. 288,) are not entitled to a similar discovery by virtue of the summary jurisdiction entrusted to the commissioners. In *ex parte Knott*, 11 Ves. 620, Lord Eldon said: "I cannot reconcile the point, that the assignees stand just in the same situation as the bankrupt, and not in a better, with the passages, and indeed the doctrine, in some of the cases." But without entering into so wide a question, it will be sufficient for the purposes of this argument to assume, what will not be disputed, that as respects this mortgage all the rights which the mortgagor possessed before his bankruptcy were, by the commission and assignment, transferred to the assignees.

In addition to this the late bankrupt statute has granted to the commissioners the power, and affords, through them, to the assignees, a comparatively cheap and expeditious mode of gaining information relative to the bankrupt's estate; to obtain which, previously to the passing of this act, the assignees would have been obliged to resort to a bill of discovery. By the 33d and 34th sections of the 6 Geo. 4, c. 16 (a), it will be seen

(a) 33. And be it enacted, that after the adjudication it shall be lawful for the commissioners, by writing under their hands, to summon before them any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, or any person whom the commissioners believe capable of giving information concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act or acts of bankruptcy committed by him, or any information material to the full disclosure of the dealings of the bankrupt; *and it shall be lawful for the said commissioners to require such person to produce any books, papers, deeds, writings, or other documents in his custody or power, which may appear to the commissioners necessary to the verification of the deposition*

that the commissioners are expressly empowered to summon before them and examine persons on oath concern-

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of such person, or to the full disclosure of any of the matters which the commissioners are authorized to inquire into; and if such person, so summoned as aforesaid, shall not come before the commissioners at the time appointed, having no lawful impediment, (made known to the said commissioners at the time of their meeting, and allowed by them,) it shall be lawful for the said commissioners, by warrant under their hands and seals, to authorize and direct the person or persons therein named for that purpose to apprehend and arrest such person, and bring him before them, to be examined as aforesaid. (a)

34. And be it enacted, that upon the appearance of any person so summoned or brought before the commissioners as aforesaid, or if any person be present at any meeting of the commissioners, it shall be lawful for them to examine every such person upon oath, either by word of mouth or by interrogatories in writing, concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act or acts of bankruptcy by such bankrupt committed, and to reduce

into writing the answers of every such person, and such answers so reduced into writing the party examined is hereby required to sign and subscribe; and if any such person shall refuse to be sworn, or shall refuse to answer any lawful questions put to him by the said commissioners touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the said commissioners any such lawful questions, or shall refuse to sign and subscribe his examination so reduced into writing as aforesaid, (not having any lawful objection allowed by the said commissioners,) *or shall not produce any books, papers, deeds, and writings and other documents in his custody or power relating to any of the matters aforesaid, which such person was required by the commissioners to produce, and to the production of which he shall not state any objection allowed by the commissioners,* it shall be lawful for them, by warrant under their hands and seals, to commit him to such prison as they shall think fit, there to remain without bail until he shall submit himself to them to be sworn, and full answers make, to their satisfaction, to all such lawful questions as shall be put to him, and sign and subscribe such examina-

(a) 13 Eliz. s. 6; 1 J. 1. s. 10; 5 Geo. 2. s. 16.

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ing the trade, dealings, or estate of the bankrupt, and to compel the production of all books, papers, *deeds*, or *writings* relating thereto; and the Court will not fail to observe that the latter is an enactment introduced into the bankrupt law, for the first time, by this act; and introduced, as it is contended, on behalf of the assignees, for the express purpose of affording the assignees an expeditious and effectual discovery before the commissioners, instead of subjecting them to the expence and delay attendant upon applications to a higher tribunal.

It was alleged by Mr. *Montagu*, on a former occasion, that the new words in the 33d and 34th sections were intended to have a confined meaning, and only to authorize the commissioners to enforce the production of deeds to prove an act of bankruptcy; *ex parte Treacher, Buck*, 18; *ex parte Law, Buck*, 110. But to this objection it is a conclusive answer, first, that the difficulty of compelling the production of such deeds was expressly removed by the 3 Geo. 4, c. 81, s. 1, which clause is now embodied in the 24th section of the 6 Geo. 4, c. 16; and, secondly, that this 24th section specifies the powers of commissioners before adjudication, whilst the 33d and 34th sections advert expressly and in terms to the powers of commissioners “after adjudication.”

The powers thus given as to discovery should be exercised, it is admitted, according to the rule, and subject to the same qualification of that rule, which prevails in courts of equity, and which has been already adverted to as the principle of the right which we seek to enforce in

tion, and produce such books, papers, deeds, writings, and other documents as aforesaid in his custody or power, to the produc-

tion of which no such objection as aforesaid has been allowed. (a)

(a) 13 Eliz. s. 6; 1 J. 1. s. 10; 5 G. 2. s. 16.

this case. A much stronger doctrine, as to the powers of commissioners of bankrupt, is attributed to Lord *Erskine*, in *ex parte Herbert*, 11 *Ves.* 113; but it has not been thought necessary to rely upon it, in a case where the assignees only desire to enforce, by means of the summary jurisdiction intrusted to the commissioners, the same discovery which would be granted by this Court on a bill filed by them against the mortgagee. (a)

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—
Ex parte
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and another.

The *Solicitor General*, Mr. *Knight*, and Mr. *Montagu* for the respondents: —

The question is, whether the commissioners have authority to compel the production of this mortgage-deed?

It may be assumed, we admit, first, that this power may exist in a case where fraud is established, which is not pretended here; secondly, that this summary mode of proceeding before commissioners was not intended to give them new powers to enforce discovery, but only a more cheap and expeditious mode of exercising jurisdiction as to discovery, which, previously to the bankruptcy, the debtor could only have obtained by bill; thirdly, that neither at law nor in equity can a *bonâ fide* purchaser for valuable consideration be compelled to discover his title (b); fourthly, that assignees stand, after the bankruptcy, in the same situation in which the

(a) The rules that prevail in courts of common law, with respect to instruments which are declared upon, are stated in *Tidd's Practice*. See also *Blakey v. Porter*, 1 *Taunt.* 386; *King v. King*, 4 *Taunt.* 666. *v Moxey*, 3 *B. & C.* 791; *Pope v. Blogg*, 9 *B. & C.* 251; *Harris v. Hill*, 3 *Stark*, 140; *Powell on Mortgages*, 629; *Ridgway's Parliamentary Cases*, as referred to by *Powell on Mortgages*; *Terland v. Saunders*, 2 *Ves.* 458;

(b) At law, see *Pickering v. Noyes*, 1 *B. & C.* 262; *Schlencker v. Walwyn v. Lee*, 9 *Ves.* 25.

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debtor stood before the bankruptcy (*a*), except as to reputed ownership.

Assuming these four positions, we contend that the commissioners cannot compel this discovery of a mortgagee's title, unless the assignees will subject themselves to the same equity to which they would be subject upon filing a bill; viz. the payment of the debt and interest due to the mortgagee. Such was the settled practice of the Court, from the reign of Henry the 8th, when the first bankrupt statute was enacted, until the year 1730, when the general bankrupt act of the 5 Geo. 2, c. 30, was passed by the legislature; from which practice it appears that the assignees, unable to obtain discovery before commissioners, resorted, but in vain, to a court of equity. (*b*)

This general practice is sanctioned by the 21 Jac. 1, c. 19, s. 13, where the payment of the debt to the mortgagee is considered a condition precedent. In the 5 Geo. 2, c. 30, s. 13, no notice was taken of mortgages; the law, therefore, was continued on the same footing as it existed under the 21 Jac. 1, c. 19.

By the 5 Geo. 2, c. 30, s. 16, the commissioners were empowered to examine witnesses; but, as this clause did not mention any thing of papers, the commissioners had not any direct mode of compelling the production of any writing. (*c*) To remedy this a power was given by

(*a*) *Gladstone v. Hadwin*, 1 M. case, 1 G. & J. 54; *ex parte* & S. 526; *Saunders v. Leslie*, Woolly, 1 G. & J. 396. The mode of compelling a reference to

(*b*) *Abery v. Paratt* (1681), 1 Vern. 27; *Parrat v. Ball* (1681), 2 Ch. Ca. 72; Anon., 35 Car. 2.; 2 Ch. Ca. 136; *Wilkie v. Bodington*, 2 Vern. 599. writings was indirectly, by an admission from the witness that he could answer more fully by reference to writings. See *In re Dale* and *Hardy*, in note, 1 Mont. & Maca. 271.

(*c*) This was a frequent subject of discussion. See *Goddard's*

the 6 Geo. 4, c. 16, ss. 33 & 34, to enable the commissioners to compel the production of writings necessary for the verification of the deposition (a); but it was never intended to subvert the settled practice, both at law and in equity, of not permitting a debtor to inspect the title of his mortgagee.

During the progress of the 6 Geo. 4, c. 16, through the House of Commons, a clause was inserted in the act, enabling the commissioners to examine the title of a mortgagee, but it was expunged and rejected in the House of Lords (b); and by the 70th section the same law was sanctioned that had previously existed. And if this omission is attempted to be explained, by saying that the provision was unnecessary, as the power was given by the 33d and 34th sections, the answer will be found in what fell from the Lord Chancellor, in *ex parte Burgess*, 2 G. & J. 200, in commenting upon the construction of general words in the bankrupt act, with relation to brickmakers, in which his Lordship says, "I cannot think that an enactment of so much importance, and at such direct variance with all the principles of the bankrupt laws, would be made, by omitting a description which could not be doubted, and leaving the question involved in the obscurity attendant upon these vague and general words."

Besides, the 33d and 34th sections are expressly con-

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(a) Ante, page 60.

(b) The following is the clause, which passed the Commons, but was rejected in the Lords:

"And be it enacted, that where there is any legal or equitable mortgage or other security affecting any part of the real or

personal estate of the bankrupt, the commissioners, after notice served upon the person or persons claiming to be entitled to such mortgage or security, shall inquire whether the same is valid," &c.

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finer to the person, the trade, the dealings, the estate of the bankrupt, and any act of bankruptcy; but it is not pretended that this is an act of bankruptcy; and it is not the estate of the bankrupt, but of the mortgagee.

The solicitor has a lien, not only for the costs of preparing this deed, but for his usual general lien; and the deed can neither be demanded nor seen by the mortgagee or his representatives, nor by any person claiming an interest subsequent to the time of the deposit, until this debt is paid. The cases cited are apparently, but only apparently, in opposition to this rule.

The LORD CHANCELLOR said, he was clearly of opinion, that the order restraining the execution of the warrant of commitment ought to be immediately discharged; and that if, in consequence, Mr. *Frowd* was taken into custody, his counsel would have a full opportunity of again bringing the case under the consideration of the Court; and that, to afford them an opportunity of doing this, with as little prejudice as possible, he would refrain from stating the reasons of his present determination until he had again heard all that could be urged against the decision of the commissioners. (a)

Ordered as prayed.

(a) The questions raised upon this petition were not again argued or brought under the notice of the Court, Mr. *Frowd* having signed an undertaking before the commissioners to produce the mortgage deed on the trial of the action at law. The deed was accordingly produced on the trial, and read in evidence on the part of the plaintiffs.

Ex parte DANBY. — In the matter of HORSLEY.

V. C.
LINC. INN,
May 20,
1830.

THE election of assignees was by creditors whose debts amounted to 660*l.*, including 200*l.* the amount of the petitioning creditor's debt, which had not been proved at a public meeting. The amount of debts proved by the creditors in the minority was 500*l.*

If assignees are elected by the vote of the petitioning creditor before he has proved, the choice may be vacated, although the petition is presented six months after the election.

This was a petition, presented six months after the choice of assignees, praying for a new choice.

Mr. *Rose* and Mr. *Roots* for the petition.

Mr. *Montagu* for the respondents : —

2 M & Del 53.

The mistake of the commissioners in rejecting a debt, unless the rejected debt is, compared with the whole debts, very considerable, is not a reason to vacate a choice of assignees, and the principle is the same whether it be the improper rejection or admission of a debt. In *ex parte Scholey*, 1 G. & J. 3, the Court says: "Parties who complain must bring forward their complaints with all reasonable diligence. These petitions come too late at the end of six months."

The VICE-CHANCELLOR : — It was settled, in *ex parte Rawson*, 2 G. & J. 353, that a choice similar to this was not a choice in the mode prescribed by the statute; and I do not think the delay of six months sufficient to bar the petitioners.

A new choice ordered.

LINC. INN, *Ex parte* KIRBY and NIAS.—In the matter of
V. C.
Jan. 5,
1830.

Petition to refer
for scandal need
not state the
scandal: it may
be by the soli-
citor who com-
plains; and the
respondents to
the original
petition need
not be served.

A PETITION was presented by *Kirby*; *Nias* was *Kirby's* solicitor.

This was a petition by *Kirby* and *Nias*, to take off the file, or refer to the Master for scandal, an affidavit reflecting on the character of *Nias*, which was sworn by the clerk of the respondent's solicitor. Costs were prayed against the solicitor and the clerk.

Deac v b 246 Mr. *Horne*, Mr. *Rose*, and Mr. *Anderton*, for the
Mont v b 259 solicitor, objected, 1st, that *Nias*, not being a party to the former petition, ought not to have been joined in this petition; 2dly, that the respondents in the original petition ought to have been made respondents; 3dly, that the petition ought to have stated the scandalous matter.

Mr. *Wakefield*, for the clerk, objected, that there was not jurisdiction as to his client.

Mr. *Knight* and Mr. *Montagu* for the petition:—

As to the first objection, the question whether a stranger to the original proceeding can petition does not occur, as *Kirby* was one of the original petitioners; and even if it did, the Lord Chancellor, in *ex parte Simpson*, 15 *Ves.* 476, says, “I do not think, with reference to this subject of scandal, in proceedings either in causes or in bankruptcy, that any application by any person is necessary. The Court ought to take care, that either in a suit or in this proceeding, allegations, bearing cruelly upon the moral character of individuals, and

not relevant to the subject, shall not be put upon the record."

With respect to the second objection, the application is properly made against the solicitor who filed the affidavit, as he is the party whose duty it is to see that the affidavit which he sanctions is proper; and this was the opinion of the Lord Chancellor, in *ex parte Simpson*.

As to the third objection, it has been decided, in *ex parte Chisman*, 2 *Glyn & J.* 315, and the cases there cited, that it is not necessary to state the scandalous matter in the petition, as it is not for the Court, but the Master, to decide in the first instance; and, if necessary, a petition of exceptions may be presented.

With regard to the clerk, the Court has jurisdiction over every person who makes an affidavit. The party who utters the scandal is, of course, the most guilty.

The VICE-CHANCELLOR made the order against the solicitor, and said, that he would direct precedents to be examined, if it was pressed, (which it was not,) against the clerk.

1 Glyn & J. 259

Ex parte ELSEE. — In the matter of JOINER.

September,
1830.

WHEN this petition was called on, and Mr. *Montagu* was about to open it, the Solicitor General objected to Mr. *Montagu's* being heard, as he was retained by the respondent.

Mr. *Montagu* said, that he was not retained by the respondent according to the professional rule in the case

The Chancellor has not jurisdiction in bankruptcy to interfere with the practice of a barrister as to a retainer.

F 3

2 Glyn & J. 316.

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Ex parte
KIRBY
and another.
In the matter
of
POTTINGER.

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—
Ex parte
 ELSEE.
 In the matter
 of
 JOINER.

of retainers; and that, even if he had been retained, the Lord Chancellor, sitting in bankruptcy, had not any jurisdiction; but that questions of this nature were always decided by some King's counsel, to whom the matter was referred; which course had, on the present occasion, been adopted by a reference to Mr. *Bell*. Mr. *Montagu* stated, that this question had been fully discussed and settled by Lord *Eldon*, in *ex parte Lloyd*. (a) There being some doubt as to the fact, it

(a) The following is the report of the above-mentioned case:

Ex parte Lloyd, November 5, 1822.—This was a petition presented to restrain Mr. *Montagu* from acting as counsel on behalf of a bankrupt, from whom he had received a retainer, after he had acted as counsel against him on the retainer of a Mr. *Lloyd*. Mr. *Montagu* had received a retainer, with the usual fee of one guinea, and had repeatedly acted under that retainer of Mr. *Lloyd's* against the bankrupt. The meetings were adjourned from time to time. In the interval, after one of the adjournments, a general retainer was left on behalf of the bankrupt. At the next meeting, of which Mr. *Lloyd's* solicitors had notice, they did not send any brief. The bankrupt did send a brief, and, as a right, claimed Mr. *Montagu's* assistance. He attended before the commissioners as counsel for the bankrupt. This was a petition to restrain him from so acting. The questions were two; 1st,

For whom, under the circumstances of the case, Mr. *Montagu* ought to act as counsel; and, 2dly, Whether the Lord Chancellor had jurisdiction upon the subject. Upon opening the petition, the Lord Chancellor expressed his clear decided opinion, that he sitting in bankruptcy had no jurisdiction whatever to interfere with a barrister in the exercise of his discretion as to the client upon whose retainer he might think proper to act; but, upon Mr. *Montagu's* soliciting his Lordship to hear the petition, as it was upon a subject unsettled, and of importance to the bar, his Lordship was pleased to say, that as "*Amicus Curie*" he was ready to hear the petition. After having heard Mr. *Horne* and Mr. *Pepys* in support of the petition, and the Attorney General and Mr. *Treslove* and Mr. *Parker* as counsel for Mr. *Montagu*, and, after having heard Mr. *Montagu* as counsel for the bankrupt, his Lordship declared, that Mr. *Montagu* was bound, under the circumstances

stood over until the next day, when Mr. *Montagu* appeared for the petitioner.

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Ex parte
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of the case, to act as counsel for the bankrupt, and dismiss the petition.

The argument was, in substance, as follows:—From the constitution of our courts, it has been deemed expedient, for the purpose of eliciting the truth both of law and of fact, that the judge should hear the most powerful opposite statements of experienced men, who are more able to do justice in a public assembly to the cases of the suitors than the suitors themselves.

The wisdom of this expedient may be easily illustrated. If a judge is called upon to decide on any doubtful question, in chemistry, for instance, would it not be desirable that he should hear the conflicting sentiments of two eminent chemists? or in a doubtful question of insanity, to hear the opposite sentiments of two eminent physicians? or in a question of fracture of a limb, the opposite sentiments of two eminent surgeons?

Assuming that the truth will be best discovered by the conflicting reasonings of men disinterested in the event of the suit, there are certain rules by which, for the attainment of this object, the practice of the bar is regulated; and, amongst the most important of these rules, with which,

till this petition was presented, no suitor has attempted to interfere, it is established;

1st. That a barrister must not exercise any discretion as to the suitor for whom he pleads in the court in which he practises.

2d. A barrister is bound to act for the party by whom he is retained as long as his services are required, and no longer.

3d. The disputes between different suitors as to the right of retainer must be decided, not by any public tribunal, but by the barristers themselves.

Each of these positions seems to be of sufficient importance to require a separate investigation.

I.

A barrister ought not to exercise any discretion as to the suitor for whom he pleads in the court in which he practises.

If a barrister was permitted to exercise any discretion as to the client for whom he will plead, the course of justice would be interrupted by prejudice to the suitor, and the exclusion of integrity from the profession.

The suitor would be prejudiced in proportion to the respectability of the advocate; and

4 Brew. 719.
L. C. 2577
2 Ch D 339

302 198

1896 Feb 17

L. C.
Nov. 19,
1830.

Ex parte EGGINGTON.—In the matter of
FARMER.

A creditor who proves his whole debt, and exhibits a mortgage for a part, and receives a dividend, forfeits the mortgage.

THE petition stated, that in 1797 a commission issued against *Farmer*; that on the 17th of May 1797, being the day previous to the choice of assignees, the petitioner proved her debt; that in the deposition, upon which she proved 107*l.* 5*s.*, she stated, “*that she had received no security or satisfaction whatever for the said debt, save*

the weight of character of the counsel would be evidence in the cause. Integrity would be excluded from the profession, as the counsel would necessarily be associated with the cause of his client, with the slanderer, the adulterer, the murderer, or the traitor, whom it may be his duty to defend.

To a barrister, therefore, it is a matter of indifference whether he appears for the most unfortunate or the most prosperous member of the community: for the poorest bankrupt or the noblest peer of the realm. He lends his exertions to all, himself to none. The result of the cause is to him a matter of indifference. It is for the court to decide. It is for him to argue. He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression, that truth is best disco-

vered by powerful statements on both sides of the question.

II.

A barrister is bound to act for the party by whom he is retained as long as his services are required, and no longer.

If a client were at liberty to avail himself of the assistance of a barrister during part of the cause, and then to reject him, without liberty to the opposite party to insist upon his services, the poor would be defenceless. This, which is not an imaginary, but a real evil, may be explained by two cases that have happened within our own time.

In the case of Mr. Shelly, argued in this court a few years ago, all the king's counsel were retained against Mr. Shelly. In a cause in which some years since the orphan children of the late Lord Lonsdale's agent were the plaintiffs in a suit instituted against that nobleman to obtain

and except the said three promissory notes, and a lien or deposit of certain title deeds belonging to certain estates in the county of Coventry, the property of the said Thomas Farmer, Jane his wife, or Jane Simpson widow, some or one of them ; that such proof was made in mistake ; that

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payment of a debt, which was all the property they had in the world, the defendant retained all the counsel at Carlisle. The judge refused to try the cause. The children were, during the life of Lord Lonsdale, deprived of their property, and exposed to great inconvenience. The whole, with the interest and all the costs, was voluntarily restored to them by his noble successor, the present Lord. Will it be contended, that opulence can possess this power merely by sending one brief to a counsel at the commencement of a suit, and then rejecting him ?

III.

The disputes as to different retainers must be decided, not by any public tribunal, but by the barristers themselves.

1st, From the necessity of expeditious decision ; and, 2dly, Because the bar is the most efficacious tribunal ; and, 3dly, Because the Chancellor has not jurisdiction.

From the very nature and frequency of these disputes, it is absolutely necessary that more expedition should be used in

these decisions than can be expected from any public tribunal. When a cause is standing in the paper for trial, is the suitor to be deprived of his counsel until an answer is put in to an injunction bill filed by his opulent opponent ? Is the business of the circuit to stand still ; or are the causes to proceed, or to be delayed at the option of a suitor who may file his bill in equity ? The delay unavoidably attendant upon the possibility of procuring decisions in these cases, is in itself satisfactory proof of the wisdom of the practice which, from time immemorial, has existed. But, even if the Court of Chancery were capable of proceeding with the requisite dispatch which the urgency of these cases requires, the power of this court would not be as efficacious as the decision of the bar upon the conduct of one of its own members. Of the power of this tribunal, no man who reflects upon the intellect and high feeling with which the bar abounds can entertain any doubt. Doctor *Paley*, when speaking of the power of the bar, says, " the opinion of the bar concerning what passes will be

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on 14th June 1802 a dividend of 2s. in the pound was paid, amounting to 10l. 14s. 6d.; that the mortgaged premises were, on the 19th September 1810, sold by the assignees, and the purchasers thereof were let into possession; that the sales were not completed; that there

impartial, and will commonly guide that of the public. The most corrupt judge will fear to indulge his dishonest wishes in the presence of such an assembly: he must encounter, what few can support, the censure of his equals and companions, together with the indignation and reproaches of his country." If such is the power of the bar over the bench, who can doubt its efficacy over one of its own members?

For these reasons the bar is the proper tribunal to decide, and a barrister to whom the case is referred is the proper judge.

Such being the doctrine respecting retainers, it may be of some use to explain what does and what does not constitute a retainer.

The true meaning of a retainer cannot be mistaken. It is an engagement for the assistance of a barrister, either generally in all causes in which the client may be engaged, or in some particular cause to which the retainer is specially limited. It is a declaration by the client, that he, at all events, intends to send a brief to the counsel whom he has re-

tained. It is an absolute, not a conditional engagement. If, by accident, the client omit to send a brief, and a brief is tendered by the opposite party, courtesy requires that notice should be sent to the retaining client; but, if the retaining client intentionally omit to send a brief, such notice is not only not requisite, but is improper. The engagement is not conditional.

Such being the nature of a retainer, it remains to explain some erroneous opinions which exist respecting acts which have been supposed to amount to retainers. These are:—

1. Advising.
2. Drawing pleadings.
3. Retainer, without an intention to send a brief, unless the opposite party sends a brief.
4. Retainer, with an intention to send a brief, not during the whole progress of the suit, but only occasionally.

Each of these acts is, at different times, supposed to amount to a retainer; but they are all improper. The two first generally originating in mistake. The two last in a practice which

is due to the petitioner 254*l.* 4*s.* 10*d.*, after deducting 10*l.* 14*s.* 6*d.*

The petition prayed that, upon refunding 10*l.* 14*s.* 6*d.*, with interest, the assignee should pay, out of the proceeds of the mortgaged premises, the amount of the principal, interest, and costs.

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of
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cannot be sanctioned. A moment's examination of each of these acts will show its true nature.

1. *Advising.*

A client confers with a barrister, whose judgment he respects; he states his case: the barrister communicates his opinion; and the conference is terminated. This does not amount to a retainer. There is no obligation upon the client to employ as an advocate a barrister, whom he values solely as a chamber counsel. Nor is the advocate restrained from acting for the opposite party, who may entertain different sentiments of his attainments.

2. *Drawing pleadings.*

A party states his case. The pleading is drawn; the barrister has discharged his duty, and his engagement is terminated. This does not amount to a retainer. There is no obligation upon the client to employ as an advocate a barrister, whom he values only as a draftsman; nor is the advocate restrained from acting for the opposite party, who may en-

ertain different sentiments of the barrister's attainments.

In each of these cases, the intercourse between the client and the barrister has been sometimes imagined to amount to a retainer, from the confidential knowledge which the advocate possesses of the case against which he is to plead; and there is some appearance of reason in this supposition: it is, however, nothing but appearance, and, even if it really existed, the perplexity is occasioned, not by the fault of the barrister, but of the client.

It is nothing but appearance, for there is no probability that a barrister will reveal any communication which has been made to him in confidence. He has no interest in the event of the suit. He is merely the organ by which the suitor states his case; and he acts only from his instructions. He has no knowledge but what his brief conveys. If the client quit his advocate, which he is at liberty to do, he must trust, and he may safely trust, to the honour and integrity in which he at first confided. There is no tempta-

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EGGINGTON.
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Mr. *Montagu* for the petition:—

Unless it was the bankrupt's security, there was no necessity for a sale previous to the proof, the rule being, "*if the creditor have a joint security from the bankrupt and any other person, or if he have a separate security from a third person, he may prove his debt against the bankrupt without a previous sale of the security.*" *Ex parte Bennet*, 2 *Ath.* 528. But, assuming that the security ought to have been sold, the proof was by mistake, and the party may rectify it. That it was by mistake, appears from the form of the deposition, where the secu-

tion to violate the confidence reposed: and, even if the temptation existed, it is checked by the most powerful of all checks, the consciousness of the immediate disapprobation of the whole profession. But, even if this danger do exist, it must be remembered that the perplexity is occasioned, not by the fault of the barrister, but of the client; who was at liberty to command the professional assistance of the advocate; and not having so done, either from intention or from accident, he must take the consequences of his own conduct, or the bar must be lowered to the necessity of asking for fees for retainers or for briefs. It may be said in this case, as was said by the Lord Chancellor in the case of *Goodhart v. Lowe*, 2d *Jacob*, 352, "It is too much to expect the court to take care of the property of persons who will not take care of it themselves."

The next species of improper retainer is,

3. *Retainer, without an intention to send a brief, unless the opposite party sends a brief.*

"Retainers to your enemies, and briefs to your friends," Sir *Samuel Romilly* used to say, "was a disgraceful proceeding, of which he was aware, and which ought to be resisted." There is not in this case any courtesy which requires notice to be given, that a brief is sent by the opposite party, the only difficulty is in discovering the fact of the intention with which the retainer was delivered.

4. *Retainer, with an intention to send a brief, not during the whole progress of the suit, but only occasionally.*

These intermittent retainers are, of course, improper.

See petition from Antigua, 1 *Knapp*. 267.

city is exhibited, which is evidence of the creditor insisting upon her right to the security. It is, therefore, a mistake of the commissioners, by which she ought not to be prejudiced. In *ex parte Downs*, 18 Ves. 290, a mortgagee elected to forego his mortgage, and the Chancellor would not permit him to retract; but here the creditor insisted upon his mortgage.

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Ex parte
EGGINGTON.
In the matter
of
FARMER.

Mr. Rose, *contra*:—

After the lapse of time—after the creditor has received a dividend, and voted in the choice of assignee, and had a right to assent or dissent from the certificate—the application is too late. Of this opinion was the Lord Chancellor, who dismissed the petition, with costs.

Ex parte AMPHLETS.—In the matter of
BROOKS.

See 2 Mad 267
Dec. 2,
1830.

THE petition by the assignee stated that *Turner*, an attorney, had proved 70*l.*, without having exhibited a bond to the bankrupt by a debtor, and which was deposited with *Turner* as security; and it prayed that the bond might be given up.

A creditor who has a bond may apply it to part of the debt, and prove for the residue.

1 Deac 283.

The respondent stated, that he had a further demand of 50*l.* for costs, against which he had set this bond.

Mr. James Russel for petitioner.

Mr. Treslove, *contra*.

Dismissed with costs. (a)

(a) See *ex parte* *Thorn*, *1 Rose*, 322; *ex parte* *Thurtell*, 1 *Rose*, 325; *ex parte* *Smith*, 2 *Rose*, 64; *ex parte* *Hornby*, 1 *Buck*, 351.

V. C.
Feb. 13,
1830.

An annuity creditor who has a policy of insurance cannot prove without a sale of the policy.

Ex parte TIERNEY. — In the matter of MORRAH.

MORRAH granted a redeemable annuity of 350*l.* for his life to *Tierney*, in consideration of 2,450*l.*

Morrah assigned to *Tierney* a policy of insurance for 2,500*l.*, which he, *Morrah*, had previously effected on his own life.

Tierney covenanted, upon the annuity being redeemed, to reassign the policy. *Morrah* became a bankrupt. The commissioners refused to admit *Tierney* to prove without a previous sale of the policies. This was a petition to prove without such previous sale.

Mr. *Horne* and Mr. *Teed* for the petitioner:—

If the policy must be sold before proof, it must be either because it is a security for the payment of the annuity, or because proof operates as redemption of the annuity. It is not, from its nature, a security for the payment of the annuity, as it can never be available until the annuity has ceased by the death of the bankrupt. As to the second point, proof can never operate as redemption, not only because the statutable value is less than the redeemable value, but because the annuity continues in force against all other parties, the proof under the commission operating only as a termination to payment by the bankrupt of the annuity during his life. The petitioner, therefore, is entitled to the policy, and to prove without any previous sale. But if the policies must be sold, the proceeds ought to be applied in payment of the premiums to the office by the petitioner for the last seventeen years.

Mr. *Pepys* and Mr. *Wilbraham* for the assignees:—

The bankruptcy having put an end to the annuity, the petitioners have not any right to the policies.

The VICE-CHANCELLOR:

Let the policies be sold, with the usual directions as to payment of expences: let the residue be applied in payment of what is due to the petitioner for payments by him for premiums and interest, with the usual directions, &c. (a)

1830.

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Ex parte
TIERNEY.
In the matter
of
MORRAH.

MOUNTFORD v. PONTEN.

The Appeal,
Nov. 19,
1829.

THIS was a bill filed by the executors of one *Mountford* against *Ponten* and *Rollo* as trustees, against the assignees of *Rollo* under a commission of bankruptcy,

An assignment, with notice of an act of bankruptcy, is not protected under the old statutes after the lapse of five years.

(a) The order is as follows:—
“ I do order that the proceeds arising from the sale of the said policies be applied, in the first place, in payment of the expences attending such sale and incidental thereto, and of the costs of all parties of and occasioned by this application (such expences and costs to be settled by the said commissioners, if the parties differ about the same); and then in payment to the said petitioner of what shall be due to him in respect of his payment for premiums and interest as aforesaid, and also in respect of the value of the said annuity and the arrears thereof, as far as the same will extend to pay and satisfy; and if there shall be any surplus after so paying the petitioner as aforesaid, such surplus to be paid over to the said assignees; but if such proceeds first subject as aforesaid shall not be sufficient to pay to the said petitioner the whole of what shall be found due to him as aforesaid, then I do order that the said petitioner be and he is hereby at liberty to go in under the said commission, and prove for such deficiency, and be admitted a creditor thereunder for what he shall so prove, and be paid a dividend or dividends thereon rateably and in equal proportion with the rest of the creditors of the said bankrupt seeking relief under the said commission.”

1829.

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Ex parte
 MOUNTFORD.
 In the matter
 of
 PONTEN.

and against the provisional assignee of the Insolvent Debtors Court, for a transfer of 800*l.* five per cent. annuities, held by *Ponten* and *Rollo* as trustees for *Rollo*.

In October 1816 *Rollo* had a reversionary interest in the five per cent. annuities, expectant upon the death of *T. and M. Rollo*, and, being indebted to the testator *Mountford*, assigned the reversionary interest to him as security for that debt, and for future advances. The assignment was dated October 26, 1816. In March 1817, *Rollo* took the benefit of the Insolvent Debtors Act. In 1823, the reversionary interest fell into possession; and, on the 20th of March 1824, a commission of bankrupt was issued against *Rollo*, founded upon an act of bankruptcy committed by the arrest and lying in prison in November 1816.

For the assignees it was stated, that, on the 9th of November 1816, *Rollo* was arrested for debt, and went to prison, where he remained until March 1817, when he was discharged under the Insolvent Debtors Act. That the assignment to *Mountford*, though dated in October, was actually not executed till the 22d of November following, when he was in prison; and that the deed was antedated, for the purpose of appearing to have been made before the arrest. *Sheffield*, one of the plaintiffs, and the attorney by whom the deed was prepared, had been examined before the commissioners, and admitted that the deed was executed by the bankrupt on the 22d of November, and when he was in prison.

Mr. *Sugden* and Mr. *Ching* for the plaintiffs: —

The plaintiffs are entitled to the fund. The commission of bankrupt did not issue for more than eight years after

the assignment to *Mountford*; and the assignment is protected by stat. 21 Jac. 1. c. 19. § 14. (a)

1830.

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Ex parte
MOUNTFORD.
In the matter
of
PONTEN.

Mr. *Heald* and Mr. *Teed* for the assignees of *Mountford* under the commission :—

This statute does not protect the assignment, as the bankrupt had then committed an act of bankruptcy, and *Mountford* knew it; and, to conceal the fact, the deed is fraudulently antedated. *Reid v. Ward*, 7 Vin. 119.

The bill was dismissed, with costs.

The plaintiffs appealed against the Vice-Chancellor's decision, which was heard by the Lord Chancellor on the 19th of May 1829.

The Solicitor General and Mr. *Ching* for the appeal.

Mr. *Horne* and Mr. *Teed* for the defendants.

The Lord Chancellor confirmed the decree, and dismissed the appeal, with costs. (b)

(a) Sect. 14.—“ Provided that it is enacted, “ no purchase from no purchaser for good and valuable consideration shall be impeached by virtue of this act, or any other act heretofore made against bankrupts, unless the commission to prove him or her a bankrupt be sued forth against such bankrupt within five years after he or she shall become a bankrupt.”

(b) By 6 Geo. 4, c. 16, s. 86, after such act of bankruptcy.”

1. m 84 242.
2 Del m 84 247.

A scrivener is a person entrusted with the money of his employer, and who finds a borrower.

Ex parte BATH. — In the matter of BURMAN.

THIS was a petition to supersede a commission against a scrivener, upon the ground that he was only an attorney, and not a scrivener. The Vice-Chancellor, Sir *Anthony Hart*, directed an issue. From this decision the present appeal was presented.

Mr. *Montagu* for the appellant.

Mr. *Sugden* for the respondent.

The Lord Chancellor confirmed the order of the Vice-Chancellor.

This issue was tried on the 2d April 1829, before Lord Chief Justice *Best*. Many cases were established in which money had been entrusted to *Burman* to find borrowers (*a*), whom he had found. He prepared the securities, for which he charged the usual fees; and, in addition, a small sum for procuration. It was contended that this did not constitute a scrivening; that the charges as an attorney, in comparison with the charges for procuration, were in every case in the proportion of twenty pounds to fifteen shillings; and that he was, therefore, endeavouring to get his living, not as a scrivener, but as an attorney; and that, from the

(a) D. Sir *John Leach*. — "If this is not a scrivening; but if the the proprietor of money, having money proprietor entrust it to found a borrower, employ an an attorney to find a borrower, attorney to carry his intentions and he so act, this is a scrivening." into effect, and give him the mo- *I have forgotten the case: I think* ney to pay over to the lender, *it was a case from Huntingdon.*

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alteration in the mode in which professional business is transacted, the business of a scrivener is virtually at an end.

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Ex parte
BATH.
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Lord Chief Justice *Best*. — That a scrivener may now exist seems manifest, when we see that, in a statute which passed so lately as the year 1825 (*a*), it is enacted, “that all persons using the trade or profession of a scrivener, receiving other men’s monies or estates into their trust or custody, shall be deemed traders.” The question, therefore, is, Did he, in the profession of a scrivener, receive other men’s monies? and the answer is easy. If an attorney negotiate loans as an attorney, that is, if a person go to his attorney, inform him that he has a sum of money which he wishes to put out, and desires him to procure security, the money in the meantime remaining in the hands of the party’s banker, he is not a scrivener. But if an attorney joins, with his business of an attorney, the business of a scrivener, he is not less a scrivener because he is an attorney: nor would he be less a coal merchant if he were to unite the two characters of coal merchant and attorney. Now, in all the instances proved in this case, the money remained, not in the hands of the party’s own banker, but in the hands of *Mr. Burman*, until he could procure suitable security on which to lend it. Was not this receiving other men’s monies into his trust or custody? and as he was paid by procuration, was he not acting in the profession of a scrivener? was he not seeking his livelihood partly as a money scrivener? No doubt he was also acting as an attorney; but this is not the question; which is,

(*a*) 6 Geo. 4, c. 16, s. 2.

1830.

Ex parte
BATH.
In the matter
of
BURMAN.

simply, "Did he use the trade of a scrivener, receiving other men's monies into his trust or custody?"

The jury found that Mr. *Burman* was a money scrivener. (a)

The petition was dismissed.

V. C.
Nov. 30,
1830.

It is not necessary to enrol a provisional assignment, when the title appears in the general assignment.

Ex parte JOHN MARTIN.

THE petition stated, that, on or about the 16th day of June 1829, a commission issued against *John Martin*, on the petition of *Alice Langdon*; and that the petitioner was chosen assignee: that the commissioners appointed *John Sturges* provisional assignee: that *Thomas Westall* was elected sole assignee; and the usual assignment was made by *John Sturges*, as such provisional assignee, and the commissioners, to *Westall*: that, in October, *Westall* commenced an action against *Sturges*, and, before the same was brought to a trial, *Westall* died: that the petitioner chose himself assignee in place of *Westall*: that the petitioner's name was substituted in the action in the place of *Westall*: that the provisional assignment was in the custody, possession, or power of *Sturges*; and

(a) The cases with respect to in *re Warren*, 2 *Schoales*, 426; scrivening are as follow: *Ex ex parte Paterson*, 1 *Rose*, 402; *parte Wilson*, 1 *Atk.* 218; *Willet ex parte Malkin*, 2 *V. & B.* 33, v. *Chambers*, *Coup.* 814; *ex parte 2 Rose*, 27; *Adams v. Malkin*, *Warren*, 2 *Schoales*, 421; *Adams 3 Camp.* 540; *Hutchinson v. Gas-* v. *Malkin*, 3 *Campbell*, 540; *Han-* coign, 1 *Holt*, 507; *Hurd v.* *key v. Jones*, *Coup.* 745; *Hanson Brydges*, 1 *Holt*, 654. v. *Harrison*, 1 *Esp.* 556, cited

the petitioner is advised that, in order to enable him to give the said indenture of assignment in evidence on the trial of the action, it is necessary that it should be enrolled: that *Sturges* refused to have it enrolled. The petition prayed that *Sturges* might, within a fortnight, leave, or cause to be left, the provisional assignment with the clerk, for enrolment, in order that the same may be enrolled, to enable the petitioner to give it in evidence on the trial of the action.

1830.

Ex parte
JOHN MARTIN.

Mr. *Jacob* for the petition.

Mr. *Knight*, for the respondents, said, that there was not any necessity to enrol the provisional assignment, as the title appeared in the assignment from the provisional assignee and the commissioners to the petitioners; and of this opinion was the Vice-Chancellor. (a)

The petition was dismissed.

Ex parte EAGER.

V. C.
Dec. 1,
1830.

THE petition stated, that a commission had issued against the petitioner in May 1829; that, to try the validity of the commission, he immediately commenced an action, in which a verdict was found against him, as

The Court may supersede, notwithstanding a verdict in favour of the commission, and, if a new trial is directed, may restrain proceeding for double costs.

(a) "In all commissions after this act shall have taken effect, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bank-

rupt, or certificate of conformity, shall be received as evidence in any court of law or equity, unless the same shall have been first so entered of record as aforesaid."—
6 Geo. 4, c. 16, s. 96.

2 Dec 1830

1880.

Ex parte
EAGER.

a trader by dealing in paper; that he was taken by surprise at the trial, as he was not described in the commission as a dealer in paper; and that, if he had had notice, he could have explained that the purchase of paper, which was supposed to constitute a trading, was only a purchase made for and at the request of his brother, who was abroad, and not with any view of profit. The petition further stated, that the petitioning creditor's debt was after the supposed trading. The petition further stated, that he could not proceed to a second trial without paying double costs of the former action, which he was wholly unable to pay, and he now sued "*in forma pauperis*." (a)

Mr. Knight and Mr. Montagu for the petition:—

The facts are not denied; the question, therefore, is simply, whether the Court will permit this commission to stand, when it knows that there is neither a trading nor a good petitioning creditor's debt to support it, merely because there has been a verdict by surprise at law. In *ex parte Thomas*, 1 Mont. & Maca. 64, the Court ordered that a petition should stand over, and

(a) 6 Geo. 4, c. 16, s. 44.—
"That every action brought against any person, for any thing done in pursuance of this act, shall be commenced within three calendar months next after the fact committed, and the defendant or defendants in any such action may plead the general issue, and give this act and the special matter in evidence at the trial, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was commenced after the time before limited for bringing the same, the jury shall find for the defendant or defendants; and if there be a verdict for the defendant or defendants, or if the plaintiff or plaintiff shall be nonsuited, or discontinue his or their action or suit after appearance thereto, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall recover double costs." Query, as to the justness of this.

that, in the meantime, the assignees should be restrained from setting up as an objection the nonpayment of the costs of the former action.

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Ex parte
EAGER.

Mr. *Parker*, for the respondent, relied upon the verdict and the nonpayment of the costs.

The VICE-CHANCELLOR directed an issue, and that the verdict in the former action should not be set up as an objection.

Mr. *Parker* then applied for security for costs, which was refused.

Ex parte BARLOW. — In the matter of BIASS.

post 207-4
Dec. 2,
1829.

THIS was a petition by an assignee, who was not a creditor, to tax the solicitor's bill previous to and after the choice of assignees.

An assignee who is not a creditor may petition to tax solicitor's bill.

Mr. *Girdleston*, against the petition, submitted, that an assignee is not entitled to petition; the words of 6 Geo. 4, c. 16, s. 14, being, " The petitioning creditor shall, at his or their own costs, sue forth and prosecute the commission until the choice of assignees; and the commissioners shall at the meeting for such choice ascertain such costs, and by writing under their hands direct the assignees (who are hereby thereto required) to reimburse such petitioning creditor or creditors such costs, out of the first money that shall be got in under the commission; and all bills of fees or disbursements of any solicitor or attorney employed under any commission,

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for business done after the choice of assignees, shall be settled by the commissioners, and the same, so settled, shall be paid by the assignees to such solicitor or attorney; provided that any *creditor* who shall have proved to the amount of twenty pounds or upwards, if he be dissatisfied with such settlement by the commissioners, may have any such costs and bills settled by a master in chancery, who shall receive for such settlement, and the certificate thereof, twenty shillings, and no more."

Mr. *Wright* for the petition: —

By 5 Geo. 2, c. 30, s. 46, it is enacted, " And to the end that commissions of bankrupt may be carried on and prosecuted with as little expence as reasonably may be, be it enacted by the authority aforesaid, that all bills of fees or disbursements claimed or demanded by any solicitor, clerk, or attorney employed under any commission of bankrupt, shall be settled, adjusted, and certified by one of the masters of the court of chancery, and so much as the master shall certify to be due to such clerk, solicitor, or attorney, and no more, shall be paid by the assignee under such commission; and the master who shall settle and adjust such bill shall have and receive, for his care in settling and adjusting the same, as also for his certificate thereof, the sum of twenty shillings, and no more."

The provision in the statute of 5 Geo. 2, c. 30, s. 46, is virtually embodied in 6 Geo. 4, c. 16, s. 14, and gives a new right to the creditors, without any restraint upon the old right possessed by the assignees; a right which, from the nature of the duties, it is most essential that they should possess: and, under this statute, it not only was never supposed that an assignee could not insist upon a taxation of the bill, but it was determined that he was the only person who, of right, was entitled to tax; and

that a creditor could not apply for a taxation, except upon a neglect of duty by the assignee: *Ex parte Walker*, 1 G. & J. 95, in which case the Vice-Chancellor said: a creditor has no right, upon other grounds, to interfere in the administration of the bankrupt's estate; and in such cases he must serve the assignee with the petition.

This right to a taxation is possessed by the assignees, not by any authority given by the statutes in bankruptcy, but by the general jurisdiction of the Court over solicitors. *Ex parte Earl of Uxbridge*, 6 Ves. 425; *ex parte Arrowsmith*, 14 Ves. 209.

The VICE-CHANCELLOR was, at first, of opinion, that the right of appeal given by 6 Geo. 4, c. 16, s. 14, was limited to creditors; but, on the next day, his Honour said, "Upon consideration, I think that, independently of the words of the statute, the Court has a general jurisdiction to order a taxation of the solicitor's bill; and that, although he is not a creditor, he may be considered as a trustee for the rest of the creditors. I never should have entertained any doubt, but from the peculiar words of 6th Geo. 4."

1829.

Ex parte
BARLOW.

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of
BIASS.



Ex parte SHADBOLT. — In the matter of FOX.

THIS was a petition by creditors to supersede, for misdescription; and for a new commission.

In the commission the bankrupt was described as follows: "*Samuel Fox*, of Surrey Row, Blackfriars Road, in the county of Surrey, druggist."

The petition stated, that *Fox* had for nine years previous to the commission kept a lunatic asylum in Bury

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LINC. INN,
Dec. 2,
1829.

In the commission the bankrupt must be described of the place where he is generally known.

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Ex parte
SHADBOLT.
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of
Fox.

Street, Edmonton, and had for a year previous to the issuing of the commission resided at a large mansion-house in the Green Lanes, in the parish of Stoke Newington, in the county of Middlesex, which he used as a retreat for insane persons; that, previous to *Fox* residing in the Green Lanes, he kept a lunatic asylum at Hackney; that *Fox* was a surgeon and apothecary, but was not known or employed by any person as a druggist; that in April 1829 *Fox* hired two small rooms in a very small house in Surrey Row, Great Surrey Street, Blackfriars Road, at the weekly rent of 5s., and had painted on the shutter, “*S. Fox, druggist;*” that *Fox* was seldom in Surrey Row, and that a menial servant, not capable of compounding drugs, was alone left there; that *Fox*’s wife and family continued to reside in the Green Lanes; that many of the creditors did not know that the commission had issued till after the bankrupt’s certificate had been signed by the commissioners, when they were informed of the fact by the overseers of Edmonton, to whom an application had been made, on behalf of the assignees, for payment of a debt due to *Fox* for the care of paupers at the Edmonton Asylum.

It was stated in answer, that *Fox* resided in Surrey Row from April to June; that it was known to several of the Edmonton creditors, some of whom had proved their debts; and that *Fox* had *bonâ fide* traded in Surrey Row.

Mr. *Pepys*, Mr. *Rose*, and Mr. *Bligh*, for the petition, relied on *ex parte Wryde*, 2 G. & J. 99.

Mr. *Knight* and Mr. *Bainbridge* for the bankrupt.

Mr. *Ching* and Mr. *Hayter* for the assignees.

For the respondents it was contended, that as the bankrupt had never carried on any trade at Edmonton or the Green Lanes, and the only place of trading was in the Surrey Row, the description was sufficient; and that all the cases had been where the bankrupt was described of a place where he had never traded. *Ex parte Parry*, 2 G. & J. 225; and *ex parte Beadles*, 2 G. & J. 244.

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Ex parte
SHADBOLT.
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The VICE-CHANCELLOR:—The bankrupt had been keeper of a lunatic asylum in the Green Lanes and at Edmonton. In April he goes to an obscure place in Surrey Road, and then the commission issues against him, in which he is merely described as of Surrey Row. The question is, whether this was a fair description, by which the creditors at Edmonton and Stoke Newington would be informed that the person against whom the commission was issued was the same person as their debtor. I am of opinion that this was not a fair description; that it was calculated to mislead the general creditors, and that it did in fact mislead. Reference ought to have been made to his former residence. The commission must, therefore, be superseded, at the costs of the petitioning creditor.

Ordered accordingly.



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LINC. INN.
Jan. 30,
1830.

Although a petition by a solicitor need not be attested, it must appear on the petition that he is a solicitor.

Ex parte BARROW. — In the matter of POILE.

PETITION by a solicitor to stay the certificate.

The attestation of the signature of the petition was imperfect, and it did not appear on the petition that the petitioner was a solicitor.

Mr. *Montagu*, for the bankrupt, objected to the attestation, and relied on the authority of *ex parte Cole*, 2 G. & J. 269.

Sir *Charles Wetherall* and Mr. *Rose*, for the petitioner, stated, that as the petitioner was a solicitor, it was unnecessary for his signature to be attested; and although it did not appear upon the petition that he was a solicitor, he was described as “a gentleman,” which was the usual and legal mode of description of a solicitor; and the Court would take notice of its own officers; and that if it was not sufficient, the petitioner was in Court, and could re-sign the petition.

Petition cannot, if to stay certificate, be signed in court.

The VICE-CHANCELLOR refused to permit the petition to be re-signed.

The petition was dismissed, with costs.



DOUGLAS v. BROWNE.

HOUSE
OF
LORDS,
February
1831.

THIS was an appeal presented against a decision in Scotland.

There was a firm of distillers in Scotland, consisting of *John Stein, Robert Stein, and James Smith*. There was a firm of bankers in London, consisting of the same *John Stein, Robert Stein, and James Smith*, with the addition of *William Smith and James Stein*. Separate commissions of bankruptcy issued against *Robert Stein, James Smith, William Smith, and James Smith*. As *John Stein* resided in Edinburgh, and had not committed an act of bankruptcy in England, a commission could not issue against him.

Assignees cannot delegate their general authority. The House of Lords will rectify an erroneous opinion of the Scotch courts, with respect to English law, founded upon the opinion of counsel.

Within a few days after such commissions issued, the distillery creditors met at Edinburgh, and resolved that *John Stein* should execute a trust deed of the distillery property, for the benefit of the distillery creditors, which was executed accordingly; and *John Stein*, immediately after its execution, proceeded to London; and, having committed an act of bankruptcy, a joint commission issued against the five.

The assignees under the joint commission executed a power of attorney to the trustees of the distillery estate to act for them, to a certain extent, as their attorney, in collecting and distributing the distillery funds. A question arose, in the court below, whether the assignees had homologated the trust deed. There was much contradictory evidence respecting the fact of homologation; but the question turned upon the law. The court in Scotland directed a case for the opinion of English counsel, which case stated as follows:—

“ 16th May 1828.—The Lord Ordinary having considered the revised cases and whole process, appoints the

3 Mord 698.

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parties to prepare and lodge a case for the opinion of English counsel upon the question, Whether, on the supposition that the letter from Messrs. *Cuthbert, Smith, and Duval*, the assignees, to the defenders, dated 26th September 1812, is held to import an authority to the defenders to settle with the distillery creditors in the capacity of trustees, and of consequence to be an homologation of the trust deed to that effect, such authority is by the law of England binding on the creditors of *Scott, Smith, Stein, and Co.*, and on the present assignees, the pursuers of this action, reference being had to all the circumstances of the case, and in particular to the minutes of the meeting of creditors held upon the 9th of that month?

“ Counsel is requested to peruse these papers, and to give his opinion upon the point mentioned in the above-recited interlocutor.”

The following was the opinion:—

“ On the supposition that the letter from Messrs. *Cuthbert, Smith, and Duval*, to the defenders, dated the 26th September 1812, is held to import an authority to the defenders to settle with the distillery creditors in the capacity of trustees, and of consequence to be an homologation of the trust deed to that effect, I am of opinion that such authority is by the law of England binding on the creditors of *Scott, Smith, Stein, and Co.*, and on the present assignees, the pursuers in the action, reference being had to all the circumstances of the case, and in particular to the minutes of the meeting of creditors held upon the 9th of that month.

“ With regard to the obligation of this transaction upon the assignees, in such their character as assignees, and individually as creditors, there could not be a question either in law or in equity.

“ With regard to the creditors generally, the question involves in a conclusion rather of fact than of law.

“ Assignees under a commission of bankrupt have the complete legal authority and title charged with a trust or duty to use them beneficially for the purposes of the commission. They are *primâ facie* fully competent to bind the creditors at their (the assignees) own discretion; and without any previous or express sanction, either of commissioners or of creditors, except in those particular instances in which such sanction is required by statute 6th Geo. 4, c. 16, § 88, viz. compounding with a debtor—giving time—taking security—submitting to arbitration, and commencing suits in equity—any other act relating to the property vested in or claimed by them, which absolute owner or claimant may do, they may do, effectually and conclusively, *provided it be for the benefit, or rather not to the detriment of the creditors; themselves at all events they bind; and if no creditor or creditors come forward to complain, the act done is good to all intents and purposes both in law and in equity.*

“ If the question were agitated in this country it would stand thus:—Creditors, one or more of them, would complain either in a court of equity, or to the equitable jurisdiction of the Chancellor in bankruptcy, that the assignees had abused their legal dominion to the prejudice of the interests of such creditor or creditors. The *primâ facie* legal validity of the transaction would be recognized; the question would be, Is it detrimental or not to those on whose behalf the assignees have thus been acting? Upon this question, as upon a matter of fact, the court would direct a reference either to the Commissioners or to a Master in Chancery, and, upon their return, yea or nay to such inquiry, would make its final adjudication. If this question were referred to me, or if in this case I am to be taken as exercising a similar

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function, I should, under all the circumstances of the case, without hesitation affirm, that the assignees and creditors were bound, holding, 1st, the assignees to be legally competent to homologate the trust deed; and, 2d, that there was not in the mode of exercising, or in the circumstances attending such exercise, any incident upon which the creditors were entitled to disaffirm it.

“ 25th November 1828.”

The court in Scotland decided as follows:—

“ The Lord Ordinary having resumed consideration of the revised cases for the parties, opinions of English counsel, this minute, and whole conjoined processes; *Finds it proved, that by the law of England the pursuers, as assignees of Stein, Smith, and company, acting for themselves and the creditors of the company, had power to homologate the trust deed executed by John Stein in favour of the defenders for behoof of the creditors of the distillery companies: Finds it proved, by the documents produced and facts admitted in process, that the pursuers did homologate that trust deed to the effect of authorising the defenders to realize and distribute the funds of the distillery companies, and for that purpose to ascertain the claims against the companies, and to settle with creditors: Finds that the defenders are bound to account to the pursuers for their actings and intromissions only in the character and with the privilege of trustees under the said trust deed, and therefore assoilzies the defenders from the reductive conclusions of the libel, and decerns; and in the multiplepoinding appoints parties to debate, reserving consideration as to expences until parties be heard in the multiplepoinding.*”

A reclaiming note was presented against this interlocutor, and the First Division of the Court of Session, upon advising it, pronounced the following judgment:—

“ The Lords having resumed consideration of this note, and advised the same, as also the revised cases for the parties, and heard their procurators thereon, they adhere to the interlocutor complained of, and refuse the note; find the pursuers liable in expences, and so far only vary the Lord Ordinary’s interlocutor; appoint an account to be given in, and remit to the auditor to tax the same, and report.” From which decision this appeal was presented.

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Mr. Knight, Mr. Montagu, and Mr. Sandford, for the appellants:—

1st, The decision in the court below is founded upon a mistake of the English law, by which it is supposed that the assignees under an English commission may delegate to others a power which they do not possess themselves. The line of duty of the assignees is clear. They are bound to sell all the bankrupt’s property, unless by the order of the Chancellor they are permitted to stay the sale. *Ex parte Goring*, 1 Ves. jun. 168; *ex parte Hughes*, 6 Ves. 617. 2dly, By section 88. of 6 Geo. 4. cap. 16. (a) the power to the assignees to

(a) Sect. 88. And be it enacted, That the assignees, with the consent of the major part in value of creditors who shall have proved under the commission, present at any meeting, whereof and of the purport whereof twenty-one days notice shall have been given in the London Gazette, may compound with any debtor to the bankrupt’s estate, and take any reasonable part of the debt in discharge of the whole, or may give time or take security for the payment of such debt, or may submit any dispute between such assignees and any persons, concerning any matter relating to such bankrupt’s estate, to the determination of arbitrators to be chosen by the assignees and the major part in value of such creditors, and the party with whom they shall have such dispute; and the award of such arbitrators shall be binding on all the creditors; and the assignees are hereby indemnified for

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submit disputes to arbitration, and to compound debts, is defined; and it has been settled for a century, by *ex parte Whitechurch*, 1 *Atkyns*, 91, during which time it has been the invariable practice of the Court, that the creditors cannot give a general authority to the assignees to institute such suits, and submit such suits to arbitration, as they in their discretion shall think fit; but they must have a meeting, upon notice given for that purpose in the London Gazette, to consider of each particular suit, or each particular case for arbitration. 3dly, By the law of England, an assignee is not entitled to any costs for his time and trouble in discharging the duties of the trust: the limit of his power, with respect to costs, is to appoint an attorney to act for him. 4thly, By the law of England the assignees have no right to make any division of the fund, except by order of the commissioners. All these provisions are violated by this trust deed, in which there are the following statements:—

“Providing and declaring always, as it is hereby specially provided and declared, that these presents are granted by us with power to the said Walter Brown and James Gibson, and the survivor of them, without any farther advice or consent of us or our creditors, to sell and dispose of the lands and others hereby disposed, either by private sale or public voluntary roup; the trustees either to compound, transact, and agree, or to submit and refer any questions, disputes, debates, or differences that

<p>what they shall do according to the directions aforesaid, and no suit in equity shall be commenced by the assignees without such consent as aforesaid; provided that if one third in value or upwards of such creditors shall not attend at any such meeting</p>	<p>(whereof such notice shall have been given as aforesaid), the assignees shall have power, with the consent of the commissioners testified in writing under their hands, to do any of the matters aforesaid. The clause in the old act was 5 G. 2, c. 30, ss. 54 & 55.</p>
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may arise betwixt them and any other person or persons touching the execution of this trust-right, whether with relation to our titles to the lands and others hereby disposed, the debts due by us, or any other thing of or concerning the premises in any manner of way. It is further provided and declared, that these presents are granted for and to this special end and effect, that the said *Walter Brown* and *James Gibson*, and the survivor of them, may apply the prices of the lands and others above disposed, and rents thereof preceding the purchaser's entry, and the debts and other effects generally above conveyed, or prices thereof, after deduction of the public burdens affecting the said estate, and of all necessary charges and expences to be disbursed by them, or their factors, in relation to this trust-right, and of such salaries and gratifications as they shall give to factors, lawyers, arbiters, and others who shall be employed in relation to the management of this present trust, and after suitable gratifications to the said trustees themselves, for payment to our just and lawful creditors, at the date hereof, of the debts resting owing by us to them, and that according to their several rights and preferences, conform to the scheme of division to be made thereof among our said creditors, according to their respective rights and interests, duly authorized by the said trustees, or the survivor of them."

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The *Lord Advocate* and the *Solicitor General*, for the respondents, contended, that the question of law was not now in discussion, as the parties in the court below had consented to take the opinion of an English barrister; and that, as no opposite opinion was taken, the Court, on appeal, must assume the law to be as it was admitted to be in the court below.

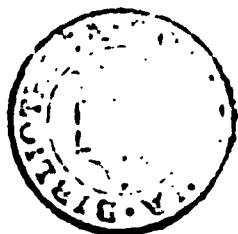
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Mr. *Knight*, in reply, stated, that although it was agreed to consult an English barrister, it was not agreed that his opinion should be the judgment of the Court; and even if it had been so agreed, that the House of Lords, which was a court both of Scotch and of English law, would not affirm an illegal and unjust decision.

The LORD CHANCELLOR expressed his clear opinion that the assignees had not any power to homologate; and that, as the court of delegates, which consisted partly of civilians and partly of common lawyers, could rectify an erroneous decision of the ecclesiastical court, founded upon a mistake of the common law, so the House of Lords, in which there was a union of the Scotch and English law, would correct a mistaken opinion by the court in Scotland in their views of the English law.

The appeal was affirmed, and the order was, that the case be remitted to the court below.



265.

V. C.
Nov. 5,
1828.

Ex parte SITGER. — In the matter of MANTON.

A debt on letters
in the nature of
a marriage set-
tlement is
proveable.

THIS was the petition of *Jacques Sitger* of Rouen, and *Susannah Aithens Sitger* his wife, the son-in-law and daughter of the bankrupt.

The petition stated, that a commission issued against *Manton* on the 12th April 1826.

That in the latter end of 1817 there was a treaty of marriage between the petitioners: that in answer to an application to *Manton* on the subject of such proposed marriage, he wrote to *Jacques Sitger*, the father of the petitioner, a letter, of which the following is a copy.

*2 Mont & ay 21.
4 Dec 26 56.*

Sir,

London, Jan. 23, 1818.

1828.

I had the pleasure of receiving your letter, stating your intention towards your son, I shall not object to his forming an union with my family. I shall not give my daughter any fortune at present; I consider her a fortune to any man, being so good and so accomplished. I intend to give her, for her own use, one hundred and fifty pounds per year. My family join with me in respects to you, Mrs. *Sitger*, and daughter. From,

—
Ex parte
SITGER.
In the matter
of
MANTON.

Sir,

Your most obedient humble servant,

To Monsieur *Sitger* ainée,
120, Rue St. Martin, Paris.

JOSEPH MANTON.

That *Manton* sent on the same day a letter to the petitioner, to the same effect, viz.

Davies Street, Berkeley Square,
London, Jan. 23, 1818.

Sir,

I have the pleasure of acquainting you, that I have written to your father, to acquaint him that I shall not have any objection to forming an union with my family; and have informed him I shall not give *Susan* any fortune at present, but will allow her one hundred and fifty pounds per year for her own use. My family desire to be kindly remembered to you: from,

Sir,

Your most obedient humble servant,

Monsieur *Sitger* fils,
Rue aux Ours, No. 3,
Rouen, France.

JOSEPH MANTON.

On the evening before the marriage *Manton* said he would revoke his consent; but the marriage took place, and the petitioner *Susannah* was in the habit of drawing for such allowance upon *Manton*; and at the date of the commission upwards of 450*l.* was due to her as arrears: that no trustees were appointed in her behalf.

1828.

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Ex parte
SITGER.
In the matter
of
MANTON.

That the petitioner offered to prove for 1,895*l.*, being the value of the annuity, and for 450*l.* the arrears.

That the commissioners rejected such proof, and assigned as a reason for such rejection, that they were of opinion that the dealings between *Manton* and the petitioner did not amount to an agreement sufficiently explicit and distinct to enable a court of equity to decree a specific performance of the same, as such, taking into consideration the words of the alleged agreement, the uncertainty of the period of the payment, and the evidence before them of the subsequent revocation, by the bankrupt *Joseph Manton*, of the alleged annuity, prior to the marriage of his daughter with the petitioner *Jacques Sitger*.

The petition prayed to be admitted to prove for 2,345*l.*, being the amount of the value of the annuity and of the arrears.

Mr. Treslove and *Mr. Montagu* for the petition.

Mr. Knight and *Mr. Anderdon* *contra*.

THE VICE-CHANCELLOR:—It appears to me that the commissioners have erred in their judgment. The substance of the agreement as stated in the letters cannot be mistaken: they say, “I will not immediately pay a gross sum, but I will pay this annuity.” The marriage was solemnized, and the annuity was, for a considerable time, paid. I am therefore of opinion that the prayer of the petition must be granted.

CASES IN BANKRUPTCY.

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RIDOUT and another, assignees of *Lewis*, a bankrupt,
v. LLOYD and Co., and ALDER.

K. B.
July 3,
1823.

TROVER to recover the value of a quantity of tallow, as being in the reputed ownership of the bankrupt.

If property is assignable by transfer tickets, the reputed owner is the possessor of the tickets.

The real owner of the tallow was *Alder*, who was an extensive tallow merchant; and wanting large sums for purchases, he applied to *Jones, Lloyd, and Co.*, who advanced him, between the 2d of November 1821 and the 31st January 1822, about 140,000*l.*, on *Alder* lodging with them the transfer tickets or dock notes of 9,334 casks of tallow.

1 Mont & Alder
1 Deane & Co
1 Mann & Co

Transfers of the tallows were not taken by *Alder* in his own name; they were transferred, part to *Rayner*, the broker, and part to *Witham*, *Alder*'s clerk. *Rayner* and *Witham* signed these transfers in blank, in order that *Alder* might be able to put over their names an order to deliver the particular tallow contained in the dock order to whomsoever *Alder* pleased. *Alder* explained to *Jones and Co.*, at the time, that these names were used by him as trustees, to avoid publicity in the tallow market.

2 Hare 256

In April 1822 all the dock orders were transferred, on the suggestion of *Alder*, to the bankrupt, named to him as a fit person by *Jones and Co.*, as their trustee; such transfer being effected merely by writing above the indorsement of *Rayner* and *Witham* the usual words, "Please to transfer and deliver the within tallows to Mr. G. *Lewis*, or his order." The transfers, completed into *Lewis*'s name, and indorsed by him, remained in the hands of *Jones and Co.* The indorsement of *Lewis* was made without his seeing one word of the contents, or knowing the nature of the papers. The tallows remained in *Lewis*'s name to 23d January 1823.

H 4

2 Mont & Alder 161.

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and another.

On the 24th February the dock company, in whose hands there remained forty-eight of these orders, received notice of an act of bankruptcy by the bankrupt.

A commission issued afterwards against *Lewis*, in whose name the tallows then stood at the docks.

Mr. Scarlet and *Mr. Adams* for the plaintiffs.

The *Solicitor General*, *Mr. Tindal*, and *Mr. F. Pollock*, for the defendants.

The wharfinger would not, without the production of the transfer ticket, have conveyed the tallows to *Lewis*.

The object of the statute is to make property available for the payment of debts contracted upon the faith of that property being assets of the debtor. Nobody knew that *Lewis* was the owner of the property, or that he had any thing to do with it.

ABBOTT, C. J. : —

I take the amount of the evidence to be this: If the ticket is brought to the wharfingers, they will act upon it; but on an order without a ticket they could not act, unless in the case of a person who was well known to them.

I think the plaintiffs ought to have gone on, and shewn the tickets to be in the bankrupt's hands. If it stands an admitted fact that the bankrupt had not the possession of the tickets, I think the law is against the plaintiffs.

The construction which the plaintiffs give the statute of *James* is quite new. I am clearly of opinion, that if *Lewis* never had the controul over the tickets, he was merely a trustee, and that the statute does not apply.

Non-suited, with liberty to move to set aside the non-suit: but no motion was made.

Ex parte GIBBS and HOWARD.—In the matter of HOWARD and GIBBS.

L. C.
April 3,
1830.

THIS petition by the bankrupts stated, that 20s. in the pound had been paid upon each separate estate, and 16s. 6d. in the pound on the joint estate, to creditors whose debts amounted to 78,118*l.* 18s. 1d.

A full allowance payable to each bankrupt.
Q. Whether allowance before final dividend.

That the only claims on the joint estate then pending were two debts, one for 7,000*l.*, the other for 3,000*l.*

post 505.
1 Mont & a
526.

That there were sufficient assets in hand to pay all the joint creditors, including the two debts of 7,000*l.* and 3,000*l.*, 20s. in the pound.

The petition prayed that the assignees should forthwith pay a full allowance to each bankrupt.

4 Dea & 62
2 Mont & a
2 Mont Dea
649.
3 — 57.

Mr. *Montagu* for the petition:—

The questions are two; first, whether the petitioners are entitled to an allowance before there has been a final dividend; secondly, whether each partner is entitled to a full allowance. As to their right to an allowance before a final dividend, the opinions which have been expressed by the Vice-Chancellor in two reported cases are at variance. In *ex parte Davis*, 1 *Mont. & Mac.* 37, His Honor adjudged that the bankrupt was entitled to an allowance, although there was some reversionary property of small amount outstanding to be realized. In *ex parte Minchin*, 1 *Mont. & Mac.* 141, His Honor says, “I understand it to be admitted at the bar, that a final dividend has been made. I make this observation, because in the case of *ex parte Davis*, in the matter of *Barlee*, where I ordered the bankrupt’s allowance to be paid, I proceeded on the authority of *ex parte Safford*, 2 *G. & J.* 128, which was cited at the bar; but, in which case, I have been since informed, that the dividend had been advertised as a first and final dividend.”

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The words of the act, s. 128, are, “ Every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who have proved, &c.” The section does not contain a word as to the time when the allowance is payable.

The law is founded upon the principle, that a debtor, whose bankruptcy is attended with favourable circumstances, should be encouraged and restored to society; an object which must be wholly defeated, if his allowance cannot be paid until after a final dividend, which in large estates, where there is frequently property abroad, is seldom until after the lapse of years. This is forcibly stated by Mr. *Bell* in his Commentaries on the Bankrupt Law of Scotland (*a*), in which he says, “ In England the allowance is said to be an honour to the liberality of modern law, having been first introduced in 1705, and, after successive alterations, restrictions, and amendments in temporary statutes, permanently established as part of the English system of bankrupt law in 1732. It is given as a stock for subsistence till the bankrupt get again into a way of livelihood, and presupposes, both from this and from the data for its ascertainment, the conclusion of the bankruptcy before it was granted.”

There are not any decisions contravening this principle. There is only the following dictum of Lord *Hardwicke's*, in *ex parte Stiles*, 1 *Atk.* 209. “ This application is premature; the commission issued no longer ago than in June last; no final dividend has been made; and before that time any creditor may come, either joint or separate, to prove debts.

“ And, even upon the common equity of this Court, if creditors will make an affidavit that they have not

(a) Page 462, 4th Edition.

read the Gazette, they will be admitted, so as not to disturb the former dividend; and by that means must, in the first place, be brought up equal to the creditors under the former dividend, before the commissioners can proceed to make a second.

“ So that, till after a final dividend, it cannot be seen whether the bankrupts will be entitled to any allowance at all, for the act of parliament directs that the net produce of his estate shall be sufficient to pay the creditors of the bankrupt, who have proved their debts under the said commission, the sum of ten shillings in the pound, over and above such allowance.”

Now as no dividend was payable, there not being a sufficient amount upon the joint and upon the separate estates: there being 10s. on the joint, and only 2s. 6d. on the separate estate, this dictum was extrajudicial, and was merely a notification that it was a hasty application for the allowance: the Lord Chancellor saying, that the application was premature, as the commission had issued in June, and this petition was presented in February. This was urged by Mr. Wakefield in *ex parte Davis*, 1 Mont. & Maca. 37, and was not answered.

Mr. Horne and Mr. Treslove, for the respondents, did not press the objection as to the demand being made before a final dividend was declared; but, as to each bankrupt being entitled to an allowance; they said that under the old bankrupt law there was but one allowance. *Ex parte Bate*, 1 Bro. 453; *ex parte Powell*, 1 Mad. 58.

The words of the new statute are, if not stronger, at least as strong as the words of the old act (a): and if it had been the intention of the legislature to reverse the decision of *ex parte Bate*, it is but reasonable to suppose

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(a) See *ex parte Minchin*, 1 Mont. & Maca. 136, in note.

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that such reversal would have been clearly and distinctly expressed; as, with respect to another clause, s. 129, the legislature did interpose by clear and specific enactment (a); but, instead of such reversal, a double allowance is, and, if this interpretation is sanctioned, a quadruple allowance will be, given to the bankrupts.

Mr. *Montagu*, in reply:—

There may be hardships on both sides; but, by the construction that there should be only one allowance, it is obvious that in extensive partnerships, that is, in the bankruptcies of opulent merchants, the amount of their allowance would not be worth accepting.

If, instead of a joint commission against all the members of the firm, a commission were to issue against each of the members, each would be entitled to a separate allowance. Will it then be contended, that the amount of the allowance ought to depend upon the form of the commission?

In *ex parte Bate*, the question was, not whether each partner should have an allowance, but whether one partner should have two allowances,—the one from the joint, the other from the separate estate.

This subject was fully considered in *ex parte Minchin*, 1 *Mont. & Maca.* 138, in which, after having compared the old with the new statute, it was determined, that each partner is entitled to a full allowance.

LORD CHANCELLOR:—

Lord *Thurlow* seems to have decided, in *ex parte*

(a) Sect. 129. And be it enacted, That in all joint commissions under which any partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate and upon the separate estate of such partner, he shall be entitled to his allowance, although his other partner or partners may not be entitled to any allowance.

Bate, that, under the old statute, there was but one allowance divisible, according to a certain proportion; and this is confirmed by Sir *Thomas Plumer*, in *ex parte Powell*, 1 *Mad.* 68. I cannot, however, but think, that it was hastily assumed that there was but one allowance.

With respect to the new act, I cannot think it reasonable to suppose that the legislature intended to make such an important change by the vague words on which reliance is placed. {I cannot think that there is any material difference between the words of the two acts.

Such is my present opinion; but, as I differ from the judgment of the Vice-Chancellor, in *ex parte Minchin*, I will consider the question. Unless, therefore, I again mention this petition, my judgment is, that there is no variation between the two acts, and that there can be but one allowance.

This case was thus mentioned again by the Lord Chancellor on this day.

When this case was last before me, I thought that there was but one allowance amongst all the bankrupts; but I have looked at the words of the act, and they are so precise and strong, that, whatever may be my opinion of what was the intention of the legislature, still I think each party entitled to his allowance. The consequence is, that were there a partnership of forty persons, the amount of allowance would be enormous. But the words are so strong, I cannot get over them.

Costs out of the estate.

The order was as follows:—

I do think fit to declare, that the said petitioners are each of them separately entitled to be paid their respective allowances, pursuant to the statute in such case made and provided; and I do order, that the said

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and another.
In the matter
of
HOWARD
and another.

Aug. 14,
1830.

13 Jan 1871.

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GIBBS
and another.
In the matter
of
HOWARD
and another.

assignees do pay to the said petitioners respectively such allowance as they are respectively entitled to under the said statutes; and I do order, that the costs of the petitioners and the assignees be paid out of the estate of the bankrupts.

14 Feb 1830.

V. C.
LINC. INN,
Nov. 3,
1830.

Ex parte COLVILL and GEDDES. — In the matter of BENJAMIN SEVERN, FREDERIC BENJAMIN KING, and JOHN SEVERN.

The assignment of a policy of insurance, without notice to the office, does not prevent the operation of the clause of reputed ownership.

THIS was a petition by *Colvill* and *Geddes*, assignees.

It stated that *Benjamin King* had, before his bankruptcy, effected two life policies.

That the commission had issued.

That, after the bankruptcy, *Davis* claimed to be entitled to the policies, or the monies produced by the sale thereof, by virtue of an assignment to him of the policies before the bankruptcy. That no notice of the assignment of the policies was given to the office until long after the issuing of the commission, and that, under the circumstances, the policies remained in the order and disposition of the bankrupt. That, by an order of the commissioners, the policies and the monies thereby assured were ordered to be sold by public auction. That, at the time the order was made, the petitioners had no ground for suspecting that notice of the assignment had not been given. That, in pursuance of the order of the commissioners, the two policies were sold for the sum of 840*l.* and of 540*l.*

That the two sums of 840*l.* and 540*l.* form part of the separate estate of *King*; and the petitioners are advised that they, as such assignees, are entitled to receive the same.

Oct 4 74
Mont 19 Feb 67
Jan 531.
Dec 135.
Ad & Ell 111
Mont 12 4 22
Dec 357.
Mont Dr Del
0-216-224
Hann. 4 2 965.
Dr 106.
Hare 253.
In Dr Del 715

That the said *Davis* died about the month of April 1830. The petition prayed, that it might be declared that the said two sums of 840*l.* and 540*l.* form part of the separate estate of the said *King*, and that the order of the commissioners might be varied, and that the said two sums of 840*l.* and 540*l.* might be paid to the petitioners.

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Mr. *Knight* and Mr. *Monro*, for the petitioners, cited *Williams v. Thorp*, 2 *Sim.* 263; *ex parte Monro*, 1 *Buck.* 300; *Falkener v. Case*, 1 *Bro.* 125; 2 *T. R.* 490; *Ryall v. Rowles*, 1 *Ves.* 348; *Rowe v. Dawson*, 2 *Ves. sen.*; *ex parte Byas*, 1 *Atk.* 124; *Hill v. Lewis*, 1 *Salk.* 132; *Jones v. Gibbons*, 9 *Ves.* 407.

Mr. *Wigram* for the respondents.

The VICE-CHANCELLOR: —

LINC. INN,
Jan. 10,
1831.

The question is, whether, as no notice was given to the assurance companies of the assignment of the policies to *Davis*, although the policies were delivered to him, the monies secured by the policies did or not remain in the order and disposition of the bankrupt *King*, within the meaning of the 72d section of the 6 Geo. 4, c. 16.

For the respondents, it is insisted, that the assignment of the 1st of July 1829, accompanied by the delivery of the policies, passed the whole beneficial interest to *King*, and, in support of that, two cases are cited, *ex parte Byas*, 1 *Atk.* 124, and *Falkener v. Case*, 1 *Bro.* 125, 2 *T. R.* 491. It is to be observed, however, that in *ex parte Byas*, it is not stated whether notice was given to Mrs. *Devereux*, before *Hankell's* bankruptcy, of the delivery of the note to *Byas*; nor, in either of the reports of *Falkener v. Case*, is there any statement made as to notice given to the underwriters. Indeed, it must be

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inferred, that in neither of the cases notice was given to the persons legally liable to pay; and it appears that both cases were decided without any question being raised upon the effect of there being no such notice. According to the report in 2 *T. R.* 494, "The Lord Chancellor admitted that, if the question had been concerning a bond, or any chose in action, that had remained in possession of the bankrupt at the time of the bankruptcy, it would have been within the statute of James;" just as if the possession by *Barclay*, the broker of the policy, subject to his own claim and lien, was not the possession of the bankrupt. In page 495, the Lord Chancellor is made to say, there was not a scintilla of property in the bankrupt; though, a few lines above, the Lord Chancellor states truly, that his right was merely equitable to redeem from *Barclay*. The decision in *Row v. Dawson*, 1 *Ves.* 331, does not affect the present question, because there the draft, which Lord *Hardwicke* said amounted to an assignment, was deposited with the officer *Swinburn*, and therefore attached immediately upon it; so that in effect there was notice given to the person liable to pay. In *ex parte Smith*, *Buck.* 149, it does not appear that the policy of insurance ever was assigned at all, and in fact the goods insured were destroyed before the bankruptcy; so that the question in that case never did or could arise. And in *ex parte Richardson*, *Buck.* 480, the present Master of the Rolls held, upon the circumstances of the case, that the stock was not in the order of the bankrupt, with the consent of the true owner. Whether that inference was rightly drawn, it is not necessary to discuss; but I think the learned judge did not mean to overrule his own decision, in the preceding year, of the case *ex parte Monro*. Sir *T. Parker*, in *Ryal v. Rowles*, 1 *Ves.* 367, 1 *Atk.* 177, lays down the rule that, if a bond is assigned,

the bond must be delivered, and notice must be given to the debtor; but, in assignments of book debts, notice alone is sufficient, because there can be no delivery. Only two months before this was stated by Sir *T. Parker*, Lord *Hardwicke* had decided *Row v. Dawson*, in which he alluded to the case of *Ryall v. Rowles*, as being then under the consideration of the Court, and stated it was made a question, how far the assignment of a bond should be supported against assignees under the commission. Yet Lord *Hardwicke* allowed the statement of the rule by Sir *T. Parker* to pass without observation. It is reasonable, therefore, to suppose that he thought it correct. In *Jones v. Gibbons*, 9 *Ves.* 410, Sir *William Grant*, alluding to Sir *T. Parker's* rule, says, "It might perhaps have been a question, whether, after assent and delivery of the security to the assignee, the bankrupt could be said to have the order and disposition, merely because there was no notice to the debtor of the assignment. Probably that requisite was added, as otherwise the debtor might safely pay the money to the person who had, without his knowledge, ceased to be his creditor. The debtor would be *bonâ fide* in making the payment, and it would be impossible to make him pay again. Sir *Thomas Parker* lays it down, certainly, that there must be that notice." In *ex parte Monro, re Frazer, Buck*, 300, the question that is now before me came before the present Master of the Rolls. The bankrupt being the obligee in a bond, and being indebted to *Monro*, as a security for the debt, assigned the bond to him, and also delivered the bond into his possession, but notice of the assignment of the bond debt was not given to the obligor. A commission issued, and the money due on the bond having been paid under an arrangement, the question was raised, whether *Monro* or the assignees in the bankruptcy were entitled; and His

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 and others.

Honor decided that the assignees under the commission were entitled. He said, “ In this case did the delivery of the bond by the bankrupt take away his power to receive the debt; and if the obligee had *bond fide* paid the debt to the bankrupt, could the petitioner have called upon him to repay it? Certainly not; and if an action had been brought on the bond by the obligor, he might have discharged it by way of set-off, in respect of any dealings with the bankrupt, without notice of the assignment. I find the practice of the commissioners has been conformable to the rule stated in *Ryall v. Rowles*. The absence of any decision to the contrary, since the time of Lord *Hardwicke*, shews that rule to have been acquiesced in; and I think rightly, for the obligee, where notice is not given, may obtain payment of the debt, which is sufficient to leave it in his ordering and disposition within the meaning of the statute.” The same principle is in effect acknowledged in *ex parte Burton, re Fossett*, and *ex parte Osborne, re Baker*, 1 G. & J. 207, 358, where book debts due to the assignor, being assigned without notice to the debtor, were held to belong to the assignees in bankruptcy of the assignor.

I no otherwise notice the decision in *Williams v. Thorp*, 2 Sim. 257, which was precisely upon the point now before me, than to observe that there has not been any appeal from it. It was made some months before the late Lord Chancellor decided the cases of *Deale v. Hall*, and *Loveridge v. Cooper*, upon appeal, 3 Russ. 1.

Those cases, decided first by Sir *T. Plumer* and afterwards by Lord *Lyndhurst*, have established that where there is an assignment made of a trust fund, of which no notice is given to the trustees, it shall be void in equity, as against a subsequent assignment of which notice is given to the trustees. With respect to those two cases, I must observe that *Cooper v. Fynmore*, 3 Russ. 60, which

follows them, was not noticed in the argument. It could not have been noticed by me with any effect, because my note does not contain the fact that notice of the assignment was actually given, though that circumstance appears upon Mr. *Russell's* report. It does not appear whether the point was much argued in *Cooper v. Fynmore*; but it was repeatedly and most laboriously argued in *Dearle v. Hall* and *Loveridge v. Cooper*.

1830.
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Ex parte
COLVILL
and another.
In the matter
of
SEVERN
and others.

It is clear that, by the assignment of the 1st of July 1829, the bankrupt parted with no legal right to the fruit of the policy. If he had assigned the policies to a second incumbrancer, and his executors had concurred in allowing payment of the proceeds to the second incumbrancer, that payment would have been good. If King, after the assignment to Davis, had sold his interest in the policies to the insurance offices, his release to them would have been good, and altogether defeated the claim of Davis. If the policies had been lost by *Davis*, and *King* had assigned his interest in the proceeds to a second incumbrancer, and had given notice of that assignment, according to *Dearle v. Hall* and *Loveridge v. Cooper*, the second incumbrancer would have been entitled. *King*, therefore, might have sold and released the policies, notwithstanding the assignment to *Davis*; and I am of opinion, both upon precedent and principle, that the order of the commissioners is wrong, and that the policies did, at the time of the bankruptcy, remain in the order and disposition of *King*, within the meaning of the statute. His assignees, therefore, are entitled to the proceeds.

An order must be made according to the prayer of the petition, without costs, as it is an appeal from the order of the commissioners. (a)

(a) Is the policy assignable? See *Ridout v. Lloyd*, ante, 103.

L. C.
Dec. 8,
1830.

A commission
cannot be
amended after
it is opened.

In the matter of STEPHENSON.

PETITION that a commission might be amended, the name of one of the commissioners being spelt *Billington* instead of *Billinton*. The commission had been opened, and the bankruptcy declared; and Mr. *Billinton* was one of the commissioners who signed the adjudication of bankruptcy.

Mr. *Macarthur* applied, either that the commission be amended and resealed, although after adjudication, or that a new commission should issue, directed to the same parties. He said, that since the repeal of the stamp duties, there was not any good reason for not amending the commission as a matter of form. *Re Barber*, 2 G. & J. 81, and marginal MS. note.

The LORD CHANCELLOR refused to permit the commission to be amended, but ordered the commission to be resealed; and that the commissioners should adjudicate *de novo*.

post 245.
Ab 1900 & 1901 75.

V. C.
Aug. 13,
1828.

Ex parte the LANCASTER CANAL COMPANY.
— In the matter of DILWORTH, ARTHING-
TON, and BIRKETT.

Canal shares, if
deemed personal
property, are
within the clause
of reputed
ownership.

THIS was a petition, stating that the petitioners were creditors of the bankrupts, and that, as security for their debt, *Dilworth* agreed to transfer 300 of the canal shares, which were assigned to the petitioners. The petition prayed that the shares might be sold, as in the case of a mortgage.

Dec 6 & 6 411.
Monday 2
16.
2 Jan 179

Mr. *Rose*, Mr. *Montagu*, and Mr. *Duckworth*, for the petition.

1828.

Sir *Edward Sugden*, Mr. *Knight*, and Mr. *Geldart*, *contra* : —

Ex parte
The
LANCASTER
CANAL
COMPANY.
In the matter
of
DILWORTH
and others.

By section 63 of the Lancaster Canal Act, it is enacted, that the shares in the canal shall be personal estate, and transmissible as such (*a*) ; and that in such act certain regulations are made for a due transfer of the shares, with which there have not been any compliance (*b*) ; and that such shares were, therefore, in the

(*a*) Sect. 63 enacts, “ that the said sum of four hundred fourteen thousand and one hundred pounds, or such part thereof as shall be raised by the several persons herein-before named, and by such other person or persons who shall or may, at any time within three calendar months from the time this act shall obtain the royal assent, become a subscriber or subscribers to the said navigation, shall be divided and distinguished into four thousand one hundred and forty-one equal parts or shares, at a price not exceeding one hundred pounds per share ; and that the shares be deemed personal estates, and shall be transmissible as such ; and that the said four thousand one hundred and forty-one shares shall be and are hereby vested in the said several subscribers, and their several and respective executors, administrators, and assigns, to their and every of their proper use and behoof, proportionably to the sum they and each of them shall severally subscribe and pay thereunto ; and all and every the bodies politic and corporate, and all and every person and persons, their several and respective successors, executors, administrators, and assigns, who shall severally subscribe and pay the sum of one hundred pounds, or such sum or sums as shall be demanded in lieu thereof, towards carrying on and completing the said intended navigation, shall be entitled to and receive, after the said navigation shall be completed, the entire and neat distribution of one four thousand one hundred and forty-one part of the profits and advantages that shall and may arise and accrue by virtue of the sum and sums of money to be raised, recovered, or received by the authority of this act, and so in proportion for any greater number of shares.”

(*b*) The 7th section enacts,

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The
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DILWORTH
and others.

reputed ownership of the bankrupt, at the time of his bankruptcy.

Mr. *Rose*, in reply : — The same objection was made in the case of the Vauxhall Bridge Company, 1 *Glyn & J.* 101, in which there is the same clause as in the present act ; the 3d section enacting as follows : “ All and every the shares and proportions of all bodies politic, corporate, and collegiate, and all other person and persons of and in the said undertaking, or the joint stock or fund of the said company of proprietors, shall be deemed personal estate, and transmissible as such, and not of the nature of real property ;” which clause was held to be confined to personalty only in the event of death, without which construction the words transmissible as such,

that it shall be lawful for the proprietors to sell or dispose of their shares, subject to the rules and conditions therein mentioned ; and that every purchaser shall have a duplicate of the deed of bargain and sale and conveyance ; and that one part of such deed, duly executed by the seller and purchaser, shall be delivered to the committee of the said company, or their clerk for the time being, to be filed and kept for the use of the said company, and an entry thereof shall be made in the book kept for that purpose, which the said clerk is required to make ; and *that until such duplicate be so delivered and filed and entered, such purchaser shall have no share of the profits of the said navigation, nor any interest for*

his share, nor any vote as a proprietor.

The 81st section of the said act points out the form of sale.

Section 83 directs, that the clerk of the said company shall, in a proper book or books, enter and keep a true and perfect account of the names and places of abode of the several proprietors of the said navigation, and of the several persons who shall from time to time become owners and proprietors of and entitled to any share or shares therein ; and that each of the proprietors of the said navigation shall and may, at all convenient times, have recourse to and peruse and inspect such books gratis, and have copies thereof, on payment of a small sum.

must be considered surplusage and inoperative. That the clause of reputed ownership has never been held to extend to any property savouring of the realty; not to a term for years of land, *Stevens v. Sole*, 1 *Ves.* 352; *Bourn v. Dodson*, 1 *Atk.* 154; *Roe v. Galliers*, 2 *T. R.* 133; nor to utensils fixed to the freehold, *Ryal v. Rolles*, 1 *Ves. sen.* 348; *Bryson v. Willey*, 1 *Bos. & P.* 382; *Horn v. Baker*, 9 *East*, 215; *Storer v. Hunter*, 3 *B. & C.* 374. That there is no disposition in the courts to extend this statute to any case not clearly within the words of it, according to the doctrine in *Greening v. Clark*, 4 *B. & C.* 318, in which the Court says: "The effect of the 21st Jac. 1, c. 19, s. 11, is, to render the property of one person, under certain circumstances, available as a fund for payment of the debts of another. Such a statute, although in some cases very beneficial, should not be applied to any that do not come within the words of it."

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The VICE-CHANCELLOR:—

The case of the Vauxhall Bridge Company appears to be directly in point. It has been said, that the interest in this particular canal company cannot be assimilated to a chattel interest in land. This appears to me to be erroneous. The company was formed for the purpose of making a canal; and, for that purpose, they were, as of necessity they must be, empowered to purchase lands. It has also been said, that the profits were not profits arising from land: but, in my opinion, they were, directly and properly speaking, profits arising from land; that is, from the use of the land and water of the company, for which tolls are payable. With respect to the enactment in the 63d section, that the shares shall be deemed personal estate, and transmissible as such, the question is, whether they are to be transmissible as terms of years, which are

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Ex parte
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not within the statute of reputed ownership, or as goods and chattels, which may be in the hands of a trader, which are within the statute? I think, from the nature of the property, and from the use of the words, transmissible as such, and from the act, prescribing that the shares shall be transferred by deed, and thus treating it in the form of a conveyance (*a*), the shares were not to be considered as goods and chattels, generally, but merely for the particular purpose mentioned in the act, that is, to be transmissible to the representative.

I think, upon the whole, that these chattels so savour of the realty, as to prevent the property of one person being applied to pay the debts of another. The order must, therefore, be as prayed.

L. C.
August,
 1829.

From this decision an appeal was presented, which was heard before Lord *Lyndhurst*, in August 1829, when the decision of His Honor the Vice-Chancellor was reversed; his Lordship saying, that there must have been some mistake in the case of the Vauxhall Bridge Company, as the words of the Vauxhall Bridge Act, as in the present act, are clear in enacting that the shares shall be deemed to be personal property; and it does not appear that the attention of the Court was in that case called to these words. (*b*)

(*a*) Sect. 79. "It shall be lawful for the several proprietors to sell their shares, &c.; every purchaser shall have a duplicate of the deed of bargain and sale and conveyance made unto him or her; and one part of such deed, duly executed by the seller and purchaser, shall be delivered to the said committee, or their clerk for the time being, to be filed and kept for the use of the said com-pany; and an entry thereof shall be made in a book or books to be kept by the said clerk for that purpose."

(*b*) Unfortunately a very elaborate argument by Sir *Edward Sugden* has been mislaid, and cannot be found amongst Mr. *Macarthur's* papers; but, as a petition of rehearing has been presented, the subject will soon be reconsidered.

2 Dec 1830

post 297.

Ex parte DAVIS and another.—In the matter of
WENTWORTH, CHALONER, RISH-
WORTH, and Co.

V. C.
December
1830.

Contingent
debts, when
contingency
remote, not
proveable.

THE petition stated, that the bankrupt *Rishworth*, in consideration of the marriage of his son *James Rishworth* with *Emma Holdsworth*, covenanted, “that, from and after the marriage, the said *James Rishworth* should receive, during his natural life, or until he should commit an act of bankruptcy on which a commission should issue, and he should be declared a bankrupt, an annuity of 100*l.* charged upon certain lands; and on such event, then to be paid to his wife *Emma Holdsworth*, for her natural life, solely for her own use, during and notwithstanding her coverture, and from and after the decease of the said *James Rishworth*, so long as she should continue his unmarried widow; and upon further trust, that in case there should be one or more child or children of such marriage, then that the trustees should, after the decease of, or next marriage, which ever should first happen, of the said *Emma Holdsworth*, in case she should survive the said *James Rishworth*, by mortgage or sale of such lands, raise the sum of 2,000*l.*, to be paid unto any one or more of such children.” There was also a covenant by the said *Thomas Rishworth*, his heirs, executors, and administrators, for the due payment of the said several annuities of 100*l.* each; and also for the due payment of the said sum of 2,000*l.*, or so much thereof as should not be raised by sale or mortgage as aforesaid:—That the marriage was solemnized:—That a commission issued:—That the lands are insufficient security for the annuities and sum of 2,000*l.*:—That the petitioners applied to the commissioners to prove the value of such annuities and sum of 2,000*l.*, with

*This case is to
reversed post.*

1 Dec 1830

2 — 17

2 Bing 16

3 M. & C. 14

1830.

Ex parte
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 and others.

an arrear of 77*l.*; to set a value on the annuities, and to direct a sale of the lands; which the commissioners refused to do without an order of the Court.

The petition prayed, that the commissioners be directed to set a value on the annuities and the 2,000*l.*, and to order a sale of the lands; the proceeds to be applied in satisfaction of such annuities, arrears, and sum of 2,000*l.*, and to prove for the difference.

Mr. *Rose* and Mr. *Spurrier* for the petition.

Mr. *Pepys* *contra*.

The VICE-CHANCELLOR, after stating the covenant, the provisoes, and the facts of the case, said, "The question is, whether, after the decisions on the statute, I can grant the relief prayed. It is to be observed, that the annuity to the husband determines on his bankruptcy, and then the annuity to the wife commences, and that the portion of the children is not to be raised till after the death or re-marriage of the wife. The contingencies in *ex parte Tindal*, 1 *Mont. & Maca.* 421-2 (a), were very similar to the present. The bankrupt covenanted to pay an annuity of 80*l.*, in trust for himself for life, then to his wife, and after her decease to any issue of the marriage. When I decided that case, it appeared to me that the words of sect. 56 (b) were imperative; but on appeal my judgment was reversed by Lord *Lyndhurst*, on the ground that the contingency was such as

(a) A petition of re-hearing is pending. have contracted any debt payable upon a contingency which shall

(b) Sect. 56. "And be it enacted, not have happened before the that if any bankrupt shall, before issuing of such commission, the the issuing of the commission, person with whom such debt has

could not be ascertained. I think it my duty to state, that it does not appear to me that the difficulty of ascertaining the value could be any obstacle; for, by the law of England, persons are entitled to rights, notwithstanding the physical difficulties there may be in ascertaining those rights. In *Warner v. Baynes*, *Amb.* 589, Lord *Hardwicke* held, that physical difficulty was not a sufficient objection to a decree for partition of the property of the New River Water Company, which consisted of a number of pipes laid through the ground, and water conduits; a bath supplied by springs, the waters of which could not be divided without destroying that part of the estate.

In many cases parties must determine, notwithstanding the difficulties to which the formation of a right judgment may be opposed. In *ex parte Grundy*, 1 *Mont. & Maca.* 309, the bankrupt covenanted for the payment of 2,000*l.*, on his decease, to his surviving issue. A commission issued in 1803. The bankrupt died in 1825. There was a petition for his children to prove under a renewed commission at a final dividend in 1828; and it was held, although the event upon which the debt was contingent had happened after the commission issued, that the 2,000*l.* was proveable.

This further occurs, — suppose the plaintiff had a

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Ex parte
DAVIS
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of
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been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

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Ex parte
DAVIS
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copyhold estate in such contingencies as the present, what is the value, except what parties choose to give? The Lord Chancellor has, however, determined a case very similar in principle to this; but if I were at liberty to decide unfettered, I should give my opinion otherwise. The parties may, however, consider whether they will appeal.

Dismissed without costs, with an intimation that proof of the arrears due at the issuing of the commission should be admitted.

Cost 4 pp.

V. C.
Feb. 7.
1831.

Commission
may be super-
seded, by con-
sent, without
surrender.

Dece 2674.

— 192.

Mont day 2

38. 7'9.

Mon. 14/12/31

Dr 682.

Ex parte GLYNN.

MR. *WAKEFIELD* applied to supersede on consent of creditors, which, as the bankrupt had not surrendered, was refused in the office. He said that there had been some doubt with respect to the practice on this subject, and the Lord Chancellor had once thought that, in such case, a supersedeas ought not to issue before surrender. *Ex parte Peaker*, 2 G. & J. 337. But, after deliberation, his Lordship altered his opinion.

The order was made.

Ex parte SYLVESTER. — In the matter of WHITFIELD.

V. C.
April 25,
1831.

THIS was a petition presented by the petitioning creditor, to supersede the commission. The petition stated, that the debt, upon which the petitioner sued out the commission, was for 110*l.* 0*s.* 9*d.*, for money lent and advanced. That in the course of the dealings between the petitioner and *Whitfield*, *Whitfield* had paid to the petitioner 30*l.*, for the purpose of being applied to the settlement of an action. That the petitioner is satisfied that he returned the said sum of 30*l.* to *Whitfield*; but such fact is denied by *Whitfield*, and the petitioner is unable to give legal evidence of the return thereof.

When the petitioning creditor petitions to supersede, a petition by the bankrupt, except for the assignment of the bond, does not lie.

The petition prayed that the commission might be superseded at the petitioner's own costs, without prejudice to any right which *Whitfield* might have to institute any proceedings against the petitioner.

After the petition had been served on *Whitfield*, and after the affidavits had been filed in support of it, *Whitfield* presented a long petition, supported by long affidavits, praying a supersedeas and an assignment of the bond.

Mr. *Montagu*, for the petitioning creditor, said, *Whitfield's* petition was wholly unnecessary, and was merely for the purpose of costs, unless the allegation that the commission had issued maliciously, and that the bond ought to be assigned, was well founded; but that it was wholly unfounded.

Mr. *Knight* and Mr. *Russell*, for *Whitfield*, contended, that, notwithstanding the petition presented by the peti-

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Ex parte
 SYLVESTER.
 In the matter
 of
 WHITFIELD.

tioning creditor, he was entitled to present a petition, as he had no controul over a petition in which he was only respondent; and might, therefore, continue for a considerable time a declared bankrupt, and divested of all his property, although the petitioning creditor admitted that the commission ought never to have issued against him; and they endeavoured, but without success, to establish such a case of malice as to warrant an assignment of the bond.

The VICE-CHANCELLOR:—As *Whitfield* might at any time have applied that the petition, in which he was respondent, might be heard, the only question is, whether this is a case of malice, which I think it is not; but if *Whitfield* can establish a case of malice at law, he shall not be prejudiced. I do therefore order *Whitfield* to pay to the assignees their costs of his petition, with liberty to him to apply, at any future time, should he succeed at law, as to the person by whom the costs ought ultimately to be paid.

V. C.
 Feb. 15,
 1831.

If at a dividend a proof is rejected, from the creditor's inability through accident to produce the security, the dividend may be opened, on immediate notice to the assignees to suspend payment.

Ex parte BARCLAY.—In the matter of ALLCOCK.

BARCLAY lent to *Laming* 400*l.*, on the security of *Laming* and *Allcock's* joint and several promissory note. A commission issued against *Allcock*. *Barclay* proved book debts, but the claim for 400*l.* was rejected, *Barclay* not being able to produce the security. On the 3d of February *Farrow*, *Barclay's* clerk, had locked up the note, and, having had a fit, could not attend to business. On the 5th he returned, and brought the note. Notice

was immediately given to the assignees to suspend the payment of the dividend. The assignees said the cheques had been issued out to within 40%. The assignees received payment after notice served, but none of the other creditors had been paid.

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Ex parte
BARCLAY.
In the matter
of
ALLCOCK.

Mr. *Montagu*, for the petition, said, that *Barclay's* inability to produce the note was not from negligence, but accident. That the other creditors had not received payment, and that the payments of the assignees to themselves were merely nominal, and the Court would order the dividend to be opened. That it was the constant practice, when a note was not forthcoming, to admit the proof on an indemnity (*ex parte Greenway*, 6 *Vesey*, 812); and that similar orders had been made by His Honor, and confirmed upon appeal.

Mr. *Rose*, for the assignees, said, that after an order of dividend a right vested in each creditor; *ex parte Grant*, 1 *Mont. & Maca.* 77; that no order could be made without serving each of the creditors; and that the proof was properly rejected, as the bankrupt was only a surety, and the note the only evidence of the debt.

The VICE-CHANCELLOR: — The case is clear. On the 4th, the clerk was disabled from attending his duties, and the petitioners attended to prove. On the 6th, notice was given to the assignees, and no creditor has been paid; for, as to the payment by the assignees to themselves, it does not appear to me to be any obstacle to the making the order. Let the order be made; the petitioner paying all costs.

2 Dec c & b 188.
1 Mont & ay 2 422.
4 Dec c & b 370.

L. C.
March 6,
1830.

Petition by
many creditors
to prove, not
multifarious if
they have a com-
mon object.

Ex parte BOUSFIELD.—In the matter of
MORGAN.

THIS was a petition by ten London creditors, complaining of the conduct of the solicitor and commissioners under a country commission, in having rejected every debt tendered on behalf of every London creditor, upon captious and unfounded objections, for the purpose of securing the choice of assignees for the Bristol creditors, whose debts did not amount to 1,000*l.*, whilst the debts of the London creditors amounted to 6,000*l.* and upwards. The petition prayed, that the commission should be renewed to London commissioners; that the debts of the creditors should be admitted; and that there should be a new choice of assignees.

The *Solicitor General* and Mr. *Montagu* for the petitioners.

Mr. *Knight* and Mr. *Wakefield*, for the respondents, objected, that the petition was multifarious, as it was a petition by several creditors, for the proof of their respective debts.

The objection was over-ruled, as the creditors had one common cause of complaint, and one common object.

The LORD CHANCELLOR ordered, That the commission should be renewed to London commissioners, who should determine whether the debts were proveable; and a new choice of assignees was ordered.

Ex parte HOWELL. — In the matter of
STODDART.

V. C.
May 10.
1831.

THE petition stated, that *Stoddart* resided near Bath : that his principal creditors, to the amount of 4,400*l.*, who were the petitioners, also resided at Bath : that a commission issued against him at Carlisle, 300 miles distant from Bath, where there were only two creditors, whose debts amounted only to 700*l.* : that all the debts tendered on behalf of the petitioners were rejected, and both the debts of the creditors resident at Carlisle admitted : that the debts of the petitioners were rejected on the ground that they were barred by the statute of limitations, although there were indorsements of the receipts of interest on the bills, so as to prevent the operation of the statute ; and the debts of the Carlisle creditors were admitted, although open to the same objection, without there having been any indorsement of interest on the notes : that the Carlisle creditors were consequently elected assignees. The petition stated, that the petitioners could have procured the admission of their proof, if the commission had been issued nearer their residence : that the commission was issued at Carlisle, to defeat the proof and to secure the choice of assignees to the Carlisle creditors. The petition prayed a new choice of assignees, and that the proofs tendered by the petitioners might be received.

A petition by several creditors, to prove and remove assignees, is not multifarious, if they have a common object.

2 Dec. 26 1831

Mr. *Montagu* for the petition.

Mr. *Rose* and Mr. *Knight* objected, that the petition was multifarious.

Mr. *Montagu* admitted that a petition to prove by different creditors, not having a common interest, was

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Ex parte
HOWELL.
 In the matter
 of
STODDART.

multifarious; *ex parte Coles, Buck*, 256; *ex parte Saer*, 1 *Mont. & Maca.* 280; but that when they had, as in the present case, an united interest, the petition is not only by their union not multifarious, but that separate petitions would be improper and attended with unnecessary expence: he said, the very same objection had been made and overruled by Lord *Lyndhurst*, in *ex parte Bousfield*, *in re Morgan*, which was produced in court. (a)

Of this opinion was the VICE-CHANCELLOR, and overruled the objection.

V. C.
 May 11,
 1831.

An insufficient
 attestation not
 waived by
 answer.

Ex parte HUTCHINSON.—In the matter of
WELLER.

THE petition was attested as follows: “Signed by *M. Hutchinson*, in the presence of *A. D.*, agent to *E. F.*, his solicitor in the matter of this petition.”

Mr. *Jacob* objected to the attestation, and cited *ex parte Weston*, 1 *Mad.* 75.

Mr. *Montagu* contended that the objection was waived, as the respondents had filed affidavits in answer.

The VICE-CHANCELLOR:—The order is a rule of the Court, which I must presume to have been made for good reasons; and, as long as it exists, I must obey it: I think that this is not a waiver, and the petition must stand over; the petitioner paying the costs of the day.

(a) Ante, 128.

Ex parte RIDLEY. — In the matter of RIDLEY.

V. C.
May 11,
1831.

PETITION to supersede; all the creditors having signed consent to the supersedeas, on being paid the full amount of their respective debts; but two of them refused to sign the petition under the following circumstances: three assignees had been appointed, and shortly afterwards the debt of one of them was cut down, on examination before the commissioners, from 130*l.* to 8*l.*; and it was discovered that another of the assignees had been convicted, in 1808, of stealing timber, in consequence of which the third refused to act with his co-assignees. *Ann Bell*, one of the principal creditors, thereupon petitioned to have a new choice of assignees; but the petition stood over by desire of the respondents, and a negotiation for a supersedeas was entered into; and Mrs. *Bell* and the solicitor to the commission (who was also a creditor) signed the consent to the supersedeas, on being paid the full amount of their debts. It was insisted by Mrs. *Bell*, that she signed her consent under the impression that she was to be paid her costs of her petition, and she opposed the granting of the supersedeas, unless it should be made a condition of granting it that such costs should be paid to her. Mrs. *Bell's* affidavit stated, that she signed her consent under the impression that the costs of the petition were to be paid to her. The other creditor, who had refused to sign the petition, swore that the bankrupt's solicitor had promised him that the costs of the petition should be paid to Mrs. *Bell*. It was insisted by the bankrupt's counsel, that the agreement with Mrs. *Bell* was not made out, and if it was, then that it was illegal, and a fraud on the other creditors who had signed their consent to the supersedeas after Mrs. *Bell*, and on the faith of her signature.

On supersedeas on consent, a creditor cannot privately stipulate for better terms than the other creditors.

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Ex parte
 RIDLEY.
 In the matter
 of
 RIDLEY.

The VICE-CHANCELLOR said, he thought the agreement, if made out, was such as the law would not support; but if there were a fair ground for Mrs. *Bell's* petition, her costs ought to be paid to her. In such a case it was very desirable to put an end to the litigation, and therefore he ordered a supersedeas on paying the costs of Mrs. *Bell's* petition; but as her case was rested on two grounds, one of which (*viz.* the agreement) had failed, he gave her no costs of this application.

Mr. *Knight* and Mr. *Kindersley* for petition.

Mr. *Pepys* and Mr. *Bayley* for Mrs. *Bell*.

V. C.
 May 12,
 1831.

Equitable debt
 not good peti-
 tioning credi-
 tor's debt.

Ex parte HAWTHORNE.—In the matter of
 HAWTHORNE.

THIS petition to supersede stated, that the petitioner contracted with *Jervise* for the purchase of a public-house for 1,100*l.*: that *Jervise* received 300*l.*, and the petitioner surrendered the premises to *Jervise* in trust, with power to sell, upon nonpayment of the 800*l.* residue, after twelve calendar months notice: that *Jervise* had sworn to a debt of 800*l.* for money advanced, which had never existed.

Mr. *Anderdon*, for the petition, contended that this was not a legal debt, but a mere equitable demand.

Mr. *Parker* *contra*:—

In the surrender of the copyhold *Hawthorne* has acknowledged the 800*l.* was paid to him; he is, there-

fore, now estopped from resorting to this formal objection to defeat the justice of the case. The words of the surrender are as follow: "And whereas at the said special court, held the day and year aforesaid, the said *Thomas Hawthorne*, in consideration of the sum of 800*l.* to him paid by the said *William Jervise*, surrendered, &c."

1831.

Ex parte
HAWTHORNE.
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of
HAWTHORNE.

The VICE-CHANCELLOR:—The affidavit made by the bankrupt is not contradicted. The real nature of the transaction cannot be mistaken. There was not any contract by *Hawthorne* that he should pay more than the 300*l.*, which he has paid. The surrender does not state the real case.

Supersedeas ordered.

Ex parte KEY.—In the matter of HEAD.

THIS petition stated, that the bill of costs of the solicitor to the commission, up to the choice of assignees, had been taxed by the commissioners at 74*l.*: that the petitioner had proved under the commission a debt to the amount of 20*l.* and upwards; and that he was dissatisfied with that taxation. The petition prayed, that the bill of costs might be referred to the master for taxation.

V. C.
LINC. INN,
May 12,
1831.

A creditor may petition to refer the solicitor's bill up to the choice of assignees to the Master for re-taxation, without stating in his petition items to which he objects as settled by the commissioners.

Mr. *Rose*, in support of the petition, said that this was now the practice, and although there was no case reported, there had been many such orders; *ex parte Shiels, MS.*

Mr. *Knight, contra*, relied upon the cases which require, after a taxation by commissioners, a statement of

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Ex parte
 KEY.

In the matter
 of
 HEAD.

particular objectionable items; *ex parte Emery, Buck*, 422; *ex parte Brereton*, 4 *Mad.* 479; and that section of the act of parliament (a), by which a dissatisfied creditor was allowed to petition, applied only to the bills of costs subsequent to the choice of assignees. It did not appear that in *ex parte Shiel* the point was discussed.

Mr. *Rose* in reply: — The object of the statute was to remedy the old inconvenience, by which, as the law then stood, a *creditor*, not being the assignee, could not present a petition to tax a solicitor's bill without bringing the assignees before the Court; and as the creditor, not having the proceedings, cannot know the objectionable *items*, it would be impossible for him to state them. He does know the *gross* amount; and being dissatisfied with *that*, he is, within the statute, entitled to petition.

And of this opinion was the VICE-CHANCELLOR, who ordered as prayed.

(a) 6 G. 4. c. 16. s. 14. The petitioning creditor or creditors shall, at his or their own costs, sue forth and prosecute the commission until the choice of assignees; and the commissioners shall, at the meeting for such choice, ascertain such costs, and by writing under their hands direct the assignees (who are hereby thereto required) to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the commission; and all bills or fees or disbursements of any solicitor or attorney employed under any commission for business done after the

choice of assignees shall be settled by the commissioners, except that so much of such bills as contain any charge respecting any action at law or suit in equity shall be settled by the proper officer of the court in which such business shall have been transacted; and the same, so settled, shall be paid by the assignees to such solicitor or attorney; provided that any creditor who shall have proved to the amount of twenty pounds or upwards, if he be dissatisfied with such settlement by the commissioners, may have any such costs and bills settled by a master in Chancery.

Ex parte BARTER. — In the matter of SPURRIER,
SPURRIER, and JOLIFFE.

V. C.
May 13,
1831.

THIS was a petition of *Thomas Barter*, stating, that he had intermarried with *Joliffe's* daughter, and that *Joliffe* had promised him 1,500*l.* as a marriage portion; but, requiring the money in trade, he promised to pay interest: that in the accounts there was an acknowledgment in writing of the payment of interest on account of the agreement before marriage; and the following declaration in writing after the bankruptcy, when he passed his last examination: "Balance due to *Barter*, in respect of the annual allowance of the interest upon 1,500*l.* at five per cent., which I agreed upon his marriage with my daughter to make him:" that the commissioners rejected the proof for 1,500*l.*, or an equivalent annuity, on the ground of there not being a sufficient writing within the statute of frauds. The petition prayed, that the proof for 1,500*l.*, or the value of the annuity, might be admitted.

A debt in consideration of marriage not proveable without a memorandum in writing.

Mr. *Swanston* for the petition: —

1st. Although an action could not be maintained, yet, when the nonperformance is the result of fraud, a Court of Equity will enforce the contract, and equitable debts are proveable. *Cocks v. Mascall*, 2 *Vern.* 34, 200; *Halfpenny v. Ballet*, 2 *Vern.* 373; *Dundas v. Dutens*, 1 *Ves.* 199; *Shaw v. Jakeman*, 4 *East*, 206.

2dly. There has been sufficient part performance to render a written memorandum unnecessary in a court of equity, as the marriage was solemnized, and the interest regularly paid.

3dly. There is sufficient evidence in writing, as no technical form of writing is necessary, and regular annual allowances are entered in accounts delivered, in one of

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Ex parte
 BARTER.
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which the sum is entered as seven months allowance, stipulated on the marriage of *Barter*; and these accounts are regularly signed; and, in addition to these entries, upon the bankrupt's last examination, the existence of the debt was acknowledged in writing by the bankrupt, which is sufficient according to the doctrine in *Gardener v. Rowe*, 2 S. & St. 353; where it is decided, "that, wherever an act done by the bankrupt is, not the creation of a new right, but the completion of the title of a previous right, the act may be done after the bankruptcy," as the indorsement upon a bill of exchange, or a declaration of trust not in writing at the time of the bankruptcy.

Mr. Richards contra.

The VICE-CHANCELLOR:—There is not any contract for the payment of this 1,500*l.*, nor was any demand made for security, but an agreement, without any security, to pay him the interest of 1,500*l.* as a marriage portion.

Dismissed with costs.

3 July 1866

ANONYMOUS.

June 4,
1827.

An affidavit not sworn before the solicitor preferred where there are two dockets.

A DOCKET was tendered at the office, on an affidavit sworn before the solicitor to the petitioning creditor. (a)

At the same time another docket was tendered, on an affidavit not sworn before the solicitor to the petitioning creditor.

Mont & Ag 418.

Lord *Eldon* preferred the docket in which the affidavit was not sworn before the petitioning creditor's solicitor.

(a) See 1 *Montagu and Gregg*, p. 56, note n.

Ex parte ATKINSON.—In the matter of NUTTAL.

L. C.
BRIGHTON,
Oct. 27,
1829.

ON the 16th of October *Barker* struck a docket, and within four days ordered a commission to be sealed at the next public seal, which would be on the 2d of November.

A commission ordered at a private seal will in the vacation be preferred.

On the 21st of October Messrs. *Hurd* and *Johnson* left fresh docket papers, for a commission to be sealed immediately at a private seal.

Mr. *Lynch*, on 27th October, applied for the commission to be sealed forthwith on the first docket.

Mr. *Moore contra*.

The LORD CHANCELLOR said, that the order had not been complied with, and ordered a commission to be sealed on the second docket.

ANONYMOUS.

L. C.
January
1829.

MR. *MONTAGU* applied, that a docket might be received on an affidavit sworn in Ireland.

Docket on an affidavit sworn in Ireland refused.

The application was refused, as by 6 Geo. 4, c. 16, s. 13, the petitioning creditor must make an affidavit before a master ordinary or extraordinary in chancery.

Lynch Docket 571.

L. C.
Feb. 25,
1831.

Ex parte DE TASTET.—In the matter of LATHAM
and PARRY.

A transfer made
on the eve of
bankruptcy,
from the fear
of criminal pro-
cess, is valid.

2 out of 2
2.

4. Giff. 658

MR. *DE TASTET* had dealt considerably with *Parry*, by delivering to him for sale brandy, wine, &c., and by receiving from *Parry*, for the proceeds of the articles, bills of exchange drawn upon the persons whom he represented as the purchasers. On the 14th day of January 1813, Mr. *De Tastet* discovered that the acceptances of certain bills which had been so delivered to him were forgeries. Mr. *De Tastet*, under the threat that he would proceed against *Parry* for the forgery, obtained from him, on the 14th and 15th days of January 1813, a return of brandy, &c., to the amount of 23,894*l.*; and on the 18th *Parry* absconded. On the 20th day of January 1813 a commission of bankruptcy issued against him and his partner *Latham*.

The facts are detailed in the following examination of Mr. *William Mardall*, taken before the Commissioners, and stated in this petition :

Mardall said, “ Mr. *Gorst* informed me, a fortnight or three weeks before the 14th of January, that a bill of *Jones, Mardall, and Co.*, to a considerable amount, had been seen by a clerk of Mr. *Daubuz* at *De Tastet's* counting-house; but, knowing that no such bill had been accepted by us, and that Mr. *De Tastet* was a merchant of importance, I supposed it was a bill of some other person, and took no notice of it. On Thursday the 14th, between one and two o'clock in the afternoon, we proceeded to Mr. *De Tastet's*. We arrived there about two o'clock. We entered the general counting-house, where there were many clerks writing. Mr. *Williams*, who had accompanied Mr. *Gorst* and myself, went into the inner counting-house, to inform Mr. *De Tastet* we

were there, and what our business was. We were introduced in three or four minutes, as I believe, to Mr. *De Tastet* in his dining-room, where we found him standing with Mr. *Parry*. I told Mr. *De Tastet* I had heard he held bills on our house to a considerable amount, and that such bills were drawn by *Latham* and *Parry*. Mr. *Parry* appeared much alarmed, and said there was a mistake, for that the bills were on some other *Jones, Mardall*, and Co., and not on the house of which I was representative; to which I replied, that there could be no other house of that name. Mr. *De Tastet* then addressed Mr. *Parry*: ‘Who is the other *Robert Jones*? let him be fetched immediately to us.’ I said, ‘Mr. *De Tastet*, the case is clear; you have been defrauded;’ or words to that effect. I then desired to see the bills. Mr. *De Tastet* informed me that one of the bills, to the amount of 1,800*l.*, was not then in his possession, for that it had been taken up by *Parry*, representing that our house did not like bills to that large amount to be seen going through our bankers; but that the other bill, to the amount of 22,000*l.* and upwards, had been in his possession; and also one on Mr. *Peile* for 11,000*l.* and upwards. I asked to see the bill for 22,000*l.* Mr. *De Tastet* then appeared to open a tin case, but did not find the bill, and immediately retired to another room, followed by Mr. *Parry*, leaving Mr. *Gorst* and myself in his dining-room, where we continued, I think, half an hour before any person returned to us. Mr. *Williams* then came, and stated that Mr. *De Tastet* could not find the bill, and requested that I would wait upon him the following morning: to which I replied, I could not leave his house till I had seen the bill; and shortly after Mr. *Parry* came into the room alone, acknowledged that he had committed such a forgery, and hoped that the matter would not be exposed, and that he believed Mr.

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De Tastet could be reconciled. I gave *Parry* for an answer, that I must insist on seeing the bill. *Parry* went with my message to Mr. *De Tastet*, that I insisted on seeing the bill. *Williams* then came again, and requested that I would defer seeing the bill, and that I would accompany them to Mr. *Lowe's*; to which I replied, I should not accompany him to any lawyer; that I considered myself ungentlemanly treated by being kept that length of time in suspense, without the bill being shewn; and that, unless Mr. *De Tastet* gave me an interview, and exhibited the bill within five minutes, I should immediately proceed to Bow Street and procure a warrant against *Latham* and *Parry*, and take them into custody; and, further, a warrant to compel Mr. *De Tastet* to appear at Bow Street the following morning; and further, if it cost me 500*l.*, the whole should appear in the public newspapers next morning, unless the bill was produced. On this message being sent by Mr. *Williams*, *Williams* returned, stating that Mr. *De Tastet* would show me the bill. Mr. *Gorst*, previous to this, had gone with Mr. *De Tastet*, and informed him that I insisted on seeing the bill. I then went into his private room, where Mr. *De Tastet* showed me the bill, in presence of *Parry*, and *Williams*, and Mr. *Gorst*, which I declared was a direct forgery. Mr. *De Tastet* then addressing himself generally, but more immediately to *Parry*, said, 'What have you done with the property?' To which *Parry* replied, 'You can lose nothing; the property is in my possession.' Mr. *De Tastet* then asked what of his sums or property he had in his possession that he could give back? To which *Parry* replied, that he could transfer him rum to the quantity of 1,500 puncheons, or 2,500 puncheons, I cannot recollect which. Mr. *De Tastet* then asked him some questions relative to some gins, which *Parry* replied were safe, meaning, as I

understood, in his possession. Mr. *De Tastet* did not hold out any threats, as I observed. Mr. *De Tastet* then addressed himself to Mr. *Gorst*, stating that there had been some misunderstanding between them, but begged he would undertake to attend Mr. *Parry*, to see him transfer what of the goods (meaning Mr. *De Tastet's* goods) he could transfer. I then observed, that, in doing so, great care must be taken that, in case *Parry* had any other creditors, they should not be injured in any transfer that might be made. To which *Parry* replied, they were perfectly solvent, and had property enough to pay every one. I then asked Mr. *De Tastet* to whom else *Parry* had said he had sold any rums; and Mr. *De Tastet* replied; I believe he said 800 puncheons to the East India Company, to be delivered to their ships, to be paid for in bills at six months; and further, that for part of the said rums *Parry* was to bring him the acceptances of the India Company. I replied, that, from a knowledge of the spirit trade, there could have been no such transaction with the Company, and that he was there further deceived. Mr. *De Tastet* addressed himself to Mr. *Parry*: ‘How is this Mr. *Parry*?’ To which Mr. *Parry* replied, ‘Sir, you are deceived.’ After this conversation, Mr. *Parry*, *Gorst*, and *Williams* went together to Devonshire Square, to see the transfer made. After they were gone, Mr. *De Tastet* entered into conversation respecting what *Parry's* views could have been in these transactions; to which I replied, as my opinion, it was to make a property to himself by false sales. This Mr. *De Tastet* rather doubted, because, as he said, taking so large a quantity into the market at one time would depress the market, and therefore he doubted whether *Parry's* intent was not to make a purse and quit the country. After about a quarter of an hour, I accompanied Mr. *De Tastet* to *Latham* and *Parry's* counting-house in Devonshire Square,

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which is in the way to my own counting-house, to call for Mr. *Gorst*, and to return with him. I went into the counting-house, and saw *Parry* there with Mr. *Gorst*. When I was in the counting-house, I learnt that it was after dock hours, and that the property could not be transferred that night to Mr. *De Tastet*. On Friday I accompanied Mr. *Peile* to Mr. *De Tastet*'s. Mr. *Parry* was there. Mr. *Peile* made Mr. *De Tastet* acquainted with the object of his visit, namely, to see his bill. Mr. *De Tastet* replied, he was advised by his solicitor not to show him the bill. Mr. *Peile* particularly urged it; and Mr. *De Tastet* begged he would defer it till 12 o'clock the next day, Saturday: in the interval he would see his solicitor, and enquire how far he was correct in so doing. On Saturday morning I again accompanied Mr. *Peile*, at his desire, and had an interview with Mr. *De Tastet*. I found *Parry* with him. It was about 12 o'clock. Mr. *Parry* stated to Mr. *Peile*, that, although his solicitor advised him not to show the bill, yet, as a merchant and gentleman, he could not refuse it. *De Tastet* produced the bill, which Mr. *Peile* declared to be a forgery. Mr. *Peile* and I left Mr. *De Tastet*, leaving Mr. *Parry* with him. This was my last interview: since then I have not seen Mr. *De Tastet* or Mr. *Parry*."

1813.

This was a petition by Mr. *De Tastet*, stating, in substance, the above facts, and that in the year 1813 an action was commenced against him by *George Carroll*, the assignee under the commission, to recover back the property which had been so obtained by Mr. *De Tastet*.

That the action came on to be tried before Sir *James Mansfield*, the then Lord Chief Justice of the Court of Common Pleas, at the adjourned sittings in London, after Trinity term 1813, when a verdict was found for the said *George Carroll*, as the plaintiff in this action, for the said 45 puncheons of brandy, 117 pipes of wine,

200 puncheons of gin, and two bills of exchange; leaving 557 puncheons of rum in the possession of your petitioner, his property.

That the said *George Carroll* afterwards moved for and obtained a rule *nisi*, in the said Court of Common Pleas, for a new trial of the said action; and, on the rule being called on for argument, your petitioner, by his counsel, consented to the said rule being made absolute.

That the said cause came on to be tried a second time at the adjourned sittings in London after Michaelmas term, in the same year 1813, before Sir *James Mansfield* and a special jury.

That at the trial of the said action the said *George Carroll* proved the several facts herein-before mentioned, and that the house of *Latham* and *Parry* was insolvent at the time of the said transfer; and it was admitted at the said trial, that the said *Joseph Parry*, on Saturday the 18th of January, absconded, and left the country, and thereby committed an act of bankruptcy, and that the said several transfers were made without the knowledge of the said *Thomas Davenport Latham*, and were concealed from him; and under such circumstances the said *George Carroll*, by his counsel, insisted that the said several transfers and assignments were void against him, as such assignee as aforesaid.

That your petitioner offered no evidence on the said trial, but insisted, by his said counsel, that the said transfers and assignments were acts of the said *Joseph Parry*, but were made in consequence of the pressure of the said *De Tastet*, who had the said *Joseph Parry* in his power; and that the same was therefore not a fraudulent preference of your petitioner, but was good against the said *George Carroll*, as such assignee as aforesaid.

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That on the said second trial of the said cause, the Lord Chief Justice, after summing up the evidence to the jury, and observing upon the several successive transfers by the said *Joseph Parry*, first of the rum, afterwards of the gin, wine, and brandy, and bills of exchange, to your petitioner, expressed himself to the following effect: “What is the object of all this willingness of the bankrupt to put his property into Mr. *De Tastet*’s hands, but to prevent his being prosecuted for forgery? How can we possibly understand the transaction in any other manner? And then, having transferred all this property into the hands of Mr. *De Tastet*, he immediately flies. It was known to Mr. *Mardell*, it was known to Mr. *Gorst*, it was known to Mr. *De Tastet*, and it was not denied by *Parry*, that he had committed a gross forgery; and the whole of this operation between Mr. *De Tastet* and *Parry* seems to have been to give him just time enough to transfer his property, and then for him to escape the hands of justice, by flying abroad.

“There has been no case, I think, in which it has been decided, that a man who is in such circumstances as *Parry* then was, with an inevitable bankruptcy to follow immediately on his quitting the kingdom, could transfer property to one creditor, to the prejudice of all the rest. A great deal has been said to you as to the difference between voluntary payments and coercive payments by the bankrupt. If the creditor arrests the bankrupt, and the bankrupt, to redeem himself, puts property into the hands of the creditor, that he may hold under a commission founded upon an act of bankruptcy committed afterwards; so if a creditor, without being involved himself at all in any transaction as to the bankruptcy, goes to the debtor, and says, ‘My debt is in danger, and I will have security, or I will arrest you

to-day or to-morrow ;' and the debtor, in order to prevent such an arrest, puts property into the hands of the creditor. He would be at liberty to hold it ; but it does not therefore follow that a creditor, who has his debtor within his power, and can take away his life for a notorious forgery, can, under such circumstances, with an immediate bankruptcy to follow, take property from that debtor. And I have never myself seen a stronger case, (as this seems to me,) with respect to the right of the assignees to recover property so transferred by the debtor to a creditor."

That upon the said trial the jury found a verdict for the said *George Carroll*, as such petitioner as aforesaid, for the whole of the said trust property sought to be recovered, which was afterwards valued by *James Gibson Esquire*, an arbitrator agreed upon between the parties, at the sum of 63,000*l*.

That the petitioner, by his counsel, tendered a bill of exceptions to the summing up of the Lord Chief Justice, on the ground that his Lordship had stated to the jury, that if the transfer was made in contemplation of the bankruptcy it was fraudulent and void.

The petition then stated the bill of exceptions, stating in substance the facts before stated.

That the said bill of exceptions came on to be argued before the Court of King's Bench, on or about the 25th of April 1815, when the said Court was of opinion, that the question, whether the transfers were made voluntarily or not, ought to have been put to the jury, and a verdict *de novo* was awarded accordingly.

That the said cause came on to be heard at the adjourned sittings, in London, after Trinity term 1815 (*a*), before the Right Honourable *Edward Lord Ellenbo-*

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(*a*) This case is reported, 1 *Starkie*, 88.

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rough, the then chief justice of the said court of King's Bench, when the same facts were proved by the said *George Carroll*, as in the former trial, and no evidence was offered on the part of the petitioner.

That, at the last-mentioned trial of the said cause, the Lord Chief Justice, after stating to the jury that, in order to constitute a fraudulent preference, the act done on the part of the bankrupt must be voluntary on his part, and from motives of favour to his creditor; and that if the act was done in consequence of a pressure by the creditors, or of apprehension on the part of the bankrupt, a transfer or assignment of property in contemplation of bankruptcy could not be set aside, proceeded to state the evidence to the jury, and concluded in the following terms: "I have to state upon the whole of this question, that, in order to reduce or set aside a transfer or disposition of property under such circumstances, the law requires that the preference should be voluntary, and in contemplation of an act of bankruptcy. That it was in contemplation of an act of bankruptcy there can be no doubt, for *Parry* must have known, about the time, that, if he did not take himself soon off, he would be subjected to the criminal law of the country, and be brought to punishment in a court of justice for his crime. You must take his absconding, therefore, as an act of bankruptcy committed; but, while you do so, the act done, as to the disposition of his effects, must have been done voluntarily; and whether, in this instance, the act which has taken place can be stated to have been done voluntarily or importunately, it is your province to determine. After the acts which the evidence has disclosed to you that he has committed, you are to say whether he has made this transfer and disposition of his property voluntarily or not. That is the only question which remains for you to decide."

That the counsel for the said *George Carroll* submitted, that there was a distinction between the pressure of a creditor in ordinary cases and the apprehension arising in the mind of a criminal person, and whether that would not be such a ground as would not entitle the guilty person so to deal with the property of *Latham* and *Parry*; but the Lord Chief Justice observed, that if any thing was to be found which overcame the free will, it ceased to be a voluntary preference, and that *Parry* had, at that time, as much as any other, *jus disponendi* of the property, as a partner of the house of *Latham* and *Parry*.

That the jury thereupon began to deliberate on their verdict, and, before they returned the same, one of the jurors inquired of his Lordship, if the question they had to consider was, whether there were any restraint on the part of Mr. *De Tastet* and Mr. *Gorst*, or whether it were a voluntary one on the part of *Parry*? To which his Lordship replied, that if it were a voluntary act on the part of *Parry*, the transfer in question would be void; but if it were from intimidation, or even from inconvenience apprehended by the misconduct of the creditor in his own mind, yet, as being a complete act of apprehension, it was not voluntary: in either case, the person who had got the advantage of such payment was entitled to retain it. That the jury thereupon found a verdict for your petitioner. That an application was afterwards made to the Court of King's Bench, by the said *George Carroll*, for a new trial; which was refused, upon the ground that the case had been properly left to the jury upon a single question, whether the transfer was voluntary or not?

That the said *George Carroll*, on or about the 12th day of December 1822, presented his petition in this matter to the then Lord Chancellor, wherein, after stating to the effect herein-before set forth, that the

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rum, gin, and wine having been sold under an order of the 18th day of August 1813, and the proceeds thereof invested in exchequer bills, which exchequer bills have been renewed from time to time, and that the received bills amounted to the sum of 53,800*l.*, besides a sum of 1,065*l.* 1*s.* 9*d.* in cash, the said petition prayed that his Lordship would be pleased to order the proceeds of the property invested in exchequer bills as therein mentioned, as well as the said bills of exchange, to be delivered over by the petitioner to the said *George Carroll*, for the benefit of the several creditors of the said bankrupts; or that his Lordship would be pleased to direct such issue to be tried, and such action to be brought, as might be necessary for the purpose of deciding the right of the said *George Carroll*, as assignee as aforesaid, or of your petitioner, to the property in question in this matter; and that, in any issue or action to be tried, the judgment against the said *George Carroll*, in the said action in the Court of King's Bench, might not be set up; and that the said *George Carroll* might be at liberty to examine the said *Thomas Davenport Latham* as a witness; and that the said commission, and all examinations and proceedings under the same, might be produced on the hearing of that petition.

That the late Lord Chancellor (*a*), on the morning of the 30th day of April 1827, wrote out and afterwards forwarded, as your petitioner is informed and believes, to the office of the secretary for bankruptcy, the minutes of an order on the said petition, and that such order was afterwards drawn up and dated the said 30th day of April 1827, and that the same was signed by the late Lord Chancellor, and delivered out to the solicitor for the said *George Carroll*, in or about the early part of the

(*a*) Earl of Eldon.

month of February 1829, as your petitioner has been informed; and that by such order it was ordered that the parties do proceed to a trial at law in his Majesty's Court of Common Pleas, after the adjourned sittings to be holden for the city of London after Trinity term then next ensuing, upon the following issue; viz.— Whether, regard being had to the facts and circumstances, the delivery and transfer of the property, or any part thereof, was fraudulent and void as against the creditors of the said *Thomas Davenport Latham* and *Joseph Parry*, or either of them, as made in contemplation of bankruptcy, or as made under such apprehensions of proceedings that might take place in case such delivery and transfer was not made, as would render such delivery void and fraudulent; in which said issue the said *George Carroll* was to be plaintiff, and the petitioner defendant; and it was ordered that the said bill of exceptions, herein-before mentioned as having been tendered to and allowed by the said late Lord Chief Justice of the Court of Common Pleas, in the said action of trover brought by the said *George Carroll* against your petitioner, be received in evidence on the trial of the said issue.

That your petitioner is aggrieved by the said order, inasmuch as your petitioner is advised, and submits, that no order ought to have been made upon the said last-mentioned petition of the said *George Carroll*.

Your petitioner, therefore, humbly prays your Lordship, that the petition so as aforesaid presented by the said *George Carroll* in this matter, on the 12th day of December 1822, may be reheard before your Lordship; and that your Lordship will be pleased to discharge the aforesaid order of the 30th day of April 1827, or that, &c.

1831.

—
Ex parte
DE TASTET.
In the matter
of
LATHAM
and another.

1831.

This petition was heard on the 25th day of February 1831.

Ex parte
DE TASTET.
In the matter
of
LATHAM.
and another.

Sir *Edward Sugden*, Mr. *Pepys*, and Mr. *Koe*, for the petition.

Sir *C. Wetherell*, Mr. *Knight*, Mr. *Beames*, and Mr. *Thompson*, for the respondents.

The LORD CHANCELLOR was pleased to discharge the order made by Lord *Eldon* on the 30th day of April 1827. (a)

(a) I cannot find either the arguments or the judgment; but the question is of so much importance, and, to my knowledge, is shortly to be agitated at law in a similar case, that, with the hope of assisting the inquiries, and with the assurance that I will do all in my power to procure for the next number the arguments at the bar and the judgment of his Lordship, I venture to subjoin the following queries:

Query 1. Are not the motives by which a debtor is influenced to part with property on the eve of bankruptcy, either, 1st, to preserve his credit, or, 2dly, to give a preference to a creditor?

Query 2. Is not the transfer made in consequence of the first motive, that is, to preserve his credit, valid; and the transfer made in consequence of the second motive, that is, to prefer a creditor, invalid?

Query 3. Is not a transfer made in consequence of the threat of civil process valid, because it is

evidence that the motive by which the debtor was actuated was to preserve his credit?

Query 4. As the conveyance by a trader of the whole of his property from the fear of civil process is an act of bankruptcy, (*Thornton v. Hargrave*, 7 *East*, 549,) is it not an act of bankruptcy, because a man must intend the necessary consequences of his own actions, that is, by incapacitating himself from trading, his motive cannot be to protect himself?

Query 5. When a felonious debtor parts with property that he may quit the country to avoid a criminal prosecution, does he part with it to preserve his credit, or, his credit being gone, to preserve his life? Does not the creditor receive to compromise a felony?

Woodier's case, B. N. P. 39; *Raikes v. Poreau*, 26 *Geo.* 3.; *Cooke*, 73.; *Vernon v. Hankey*, 27 *Geo.* 3.; *Fowler v. Padget*, 7 *T. R.* 509.

look at p. 153 below
7 B. N. P. 438

see p. 153 below

1 Will. 4. c. 7. s. 7.

An Act *inter alia* for amending the Law as to Judgment on a Cognovit actionem in Cases of Bankruptcy.

“ And whereas by an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled *An Act to amend the Laws relating to Bankrupts*, it is provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors : and whereas, by reason of such provision, plaintiffs have been and may be deterred from accepting a cognovit actionem, with stay of execution, whereby the expence of further proceedings in such action might have been and may be saved or diminished ; for remedy thereof be it enacted, that no judgment signed or execution issued, after the passing of this act, on a cognovit actionem signed after declaration filed or delivered, or judgment by default, confession, or nihil dicit, according to the practice of the court, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, shall be deemed or taken to be within the said provision of the said recited act.”

No judgment signed or execution issued on a cognovit signed after declaration filed shall be deemed within the provision of 6 G. 4. c. 16.

CASES
IN
BANKRUPTCY.

Ex parte DE TASTET. — In the matter of
LATHAM and PARRY.

1 Montague

SINCE the publication of this case, reported in page 138, I have procured a copy of the arguments at the Bar, and of the Lord Chancellor's judgment; but, as the case is of considerable importance, and, as there is not any correct report of the different proceedings and arguments, I have endeavoured to trace them from their commencement to their conclusion.

L. C.
LINC. INN,
Feb. 25,
1831.

A transfer made
on the eve of
bankruptcy,
from fear of
criminal pro-
cess, is valid.

The facts of the case are stated in page 138 of this volume.

In the year 1813, an action was commenced by Mr. *Carroll*, who, for this purpose, was appointed assignee, against Mr. *De Tastet*, to recover the value of 45 puncheons of brandy, 117 pipes of wine, 200 puncheons of gin, three bills of exchange, and 576 puncheons of rum; the value of which was, by order of the Chancellor, paid into court to abide the event of the suit.

First Action.
1813.
Co. P.

1831.

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Ex parte
 DE TASTET.
 In the matter
 of
 LATHAM
 and another.

It was tried, at the sittings after Trinity Term 1813, before Sir *James Mansfield*, the then Lord Chief Justice of the Court of Common Pleas, when a verdict was found for Mr. *Carroll* for the whole amount sought to be recovered, with the exception of the 576 puncheons of rum; which were excepted upon the supposition that Mr. *De Tastet* had intended to purchase the rum through Messrs. *Parry* and *Latham*.

Mr. *Carroll* obtained a rule for a new trial, on the ground that the opinion respecting the rum was erroneous, which, Mr. *De Tastet* not opposing, was made absolute.

Second Action,
 20 Dec. 1813,
 Co. P.

The cause was tried a second time, on the 20th December 1813, before Sir *James Mansfield* and a special jury.

Mr. Serjeant *Best* (who stated the case), Mr. Serjeant *Pell*, and Mr. *Scarlett* for the plaintiff.

Mr. Serjeant *Shepherd*, Mr. Serjeant *Vaughan*, and Mr. *Holroyd* for the defendant.

Mr. Serjeant *Shepherd* : — There are three species of property claimed by the plaintiff: 1st, the rum; 2dly, the gin and wine; and 3dly, the bills of exchange; and, although there is a material distinction between these different classes of property, Mr. *De Tastet* is entitled to your verdict as to all.

The principle, and the only principle, upon which the plaintiff is entitled to recover, is, not that the transaction took place when *Parry* and *Latham* were insolvent; not that *Parry* and *Latham* contemplated that, in consequence of this transaction, they would become bankrupts; not that Mr. *De Tastet* supposed they must necessarily become bankrupts; but because it was a

voluntary preference on the part of the bankrupt, by his putting the property into the creditor's hands spontaneously, and not from any operation of legal arrest or other terror; for there must be a voluntary and spontaneous act by the bankrupt, meaning to give a preference, and not an operation of fear and apprehension, to invalidate such a transaction.

What was done by *Parry* at the first interview, and in consequence of that interview, was as much pressure on the part of Mr. *De Tastet* on *Parry*, as if Mr. *De Tastet* had seized him by the collar, and said he should not stir till he had done it; and it has never been supposed that in such case the transaction can be invalidated.

If Mr. *De Tastet* had said, "I believe, from your having committed this forgery, that you are insolvent; that your life is forfeited; that you will be a bankrupt; but I will have property to secure me," and Mr. *Parry* had given him this property, the law would allow him to keep it; for the very apprehension of the debtor being insolvent — the very apprehension of his becoming a bankrupt — the very apprehension of the loss of money unless security can be obtained, justifies the creditor: but, on the other hand, if it proceeded spontaneously, it would be voidable by the assignees.

Acts done by bankrupts after acts of bankruptcy are all void, but not acts done before the act of bankruptcy. There is, indeed, an excrescence which has grown upon the bankrupt laws, which is the voluntary disposition of property by the bankrupt to prefer a particular creditor; but there must be voluntariness; there must (if I may use the expression) be spontaneousness. Can it be said that the delivery by *Parry* to Mr. *De Tastet* was in this case spontaneous? He starts, as it were, upon him at once, and says, Where is my rum? Where is my gin?

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Ex parte
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 and another.

Where is my property? *Parry* says, There is so much here and there; and then Mr. *De Tastet* replies, "That will not cover me;" and he sends for Mr. *Gorst*, and desires him instantly to act as his broker, for the purpose of having the transfer, upon which he had insisted, carried into effect.

Lord Chief Justice *Mansfield*: —

There does not seem to be any difficulty with respect to the law. Within the last thirty or forty years there have been many cases in which it has been decided, that property transferred by a bankrupt, though to a real creditor, when it was clear to him, and to the creditor, that he was (according to the common expression) in the jaws of bankruptcy, cannot be held; because if it could the bankrupt laws would be waste paper. If, when bankruptcy is coming upon a man, and within a very short period of it, he could by any means transfer his property to favour particular creditors, all the other creditors would be cheated, and the commission would be mere fallacy, for there would be no property found on which the commission could operate for the benefit of the general creditors.

The present case is this: the debtor is notoriously insolvent, and had committed a capital felony, which was known to Mr. *De Tastet*. Without blaming Mr. *De Tastet* for having regard to property of the amount of 100,000*l.*, I must say, that his attention to this property is regarded by the law only as his second duty; his first was to bring the criminal to justice. Instead, however, of having discharged this important duty, the whole of this operation between Mr. *De Tastet* and *Parry* seems to have been to give *Parry* just time enough to transfer this property, and then to escape the hands of justice.

There has been no case, I think, in which it has ever been decided that a man who is in such circumstances as *Parry* then was, with an inevitable bankruptcy to follow immediately on his quitting the kingdom, could transfer property to one creditor to the prejudice of all the rest. If, indeed, a creditor says to his debtor, "My debt is in danger; I will have security, or I will arrest you to-day or to-morrow;" and the debtor, in order to prevent such an arrest, puts property into the hands of the creditor, he would be entitled to hold it; but it does not therefore follow, that a creditor who has his debtor within his power, and can take away his life for a notorious forgery, can, under such circumstances, with an immediate bankruptcy to follow, take property from that debtor. I have never seen a stronger case than this, with respect to the right of the assignees to recover property so transferred by the debtor to a creditor.

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DR TASTET.
 In the matter
 of
LATHAM.
 and another.

Mr. Serjeant *Shepherd*: — I would submit to your Lordship, whether it should not be left to the jury, whether *Parry* made this transfer in consequence of the fear of a prosecution, which may raise a question of law whether it was done voluntarily or not.

Lord Chief Justice *Mansfield*: — I will not put such a question. *De Tastet* asks the bankrupt, "Can I have the rum transferred to me?" "Yes," says the man, "you may."

Mr. Serjeant *Shepherd*: — Then we submit that we are entitled to have that fact found; and, if it is so found, we mean to take the opinion of the Court upon it. We apprehend it should be found, not that it was

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done involuntarily, but that it was done under such and such circumstances.

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of
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The jury found a verdict for Mr. *Carroll* for the whole of the property.

Mr. *De Tastet* tendered a bill of exceptions to the summing up of the Lord Chief Justice, as stated in page 145 of this volume.

Argument on
bill of excep-
tions, April 21,
1815.

This case, on the bill of exceptions, was argued in the Court of King's Bench on 21st April 1815.

Mr. *Littledale* : — Upon this bill of exceptions there is a writ of error, which is to the same effect as the bill of exceptions. I am to submit, that in this case the direction of the Chief Justice was erroneous.

Lord *Ellenborough* : — State, as shortly as you can, the facts of the delivery and transfer.

Mr. *Littledale* : — The way in which it is done is this : — Upon Mr. *De Tastet*'s exclaiming, Where is my rum ? Where is my gin ? *Parry* assured him that it was all safe ; that he had got into his possession 1,500 puncheons of rum, and 200 puncheons of gin. *De Tastet* said that would not cover him ; and he appeared to be making a calculation of the value of it. *Parry* found that there was not so much rum and gin as he had mentioned, and therefore he substituted a quantity of brandy, and bills of exchange ; and then the case goes on to state, that all this was done with as much expedition as possible ; that the transfer was in the name of *De Tastet*, and that the bills of exchange were handed over to cover the damage. It appears to have been done with as much expedition as the thing would admit of.

Sir *Simon Le Blanc* : — It was done at the moment previous to the bankruptcy, when it was evident the man would not stand his ground.

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Mr. *Littledale* : — The objection we make is, that although the delivery to *De Tastet* was fraudulent, it was made when *Latham* and *Parry* were not insolvent. The objection we make to that is, that it does not contain another proposition, namely, that it was a voluntary delivery. Its being a fraudulent delivery is not sufficient to make it void, unless it was done voluntarily. If it appears that it was not done voluntarily, but under the apprehension of personal inconvenience, or under a threat —

Lord *Ellenborough* : — Your general proposition is, that something further should have been left to the jury.

Mr. *Littledale* : — We say the other point ought to have been left to the jury. If it had, and they had found one way or the other, we should have had the benefit of their finding ; but at present we have not that benefit. At present, the only point is, whether this was done in contemplation of bankruptcy. It is that we object to. We say, besides, that the learned judge ought to have left another proposition to the jury, and have put it to them, whether the transfer was made voluntarily, or under the apprehension of a prosecution for forgery. If the jury had found this was a delivery under the apprehension of a prosecution for forgery, we should have submitted that we should have fallen within the rule of the cases which have decided that, where a person on the eve of a bankruptcy delivers over pro-

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perty under the apprehension of arrest and urgent importunity, the transfer is not void. What we submit is, that Chief Justice *Mansfield* has not left enough to the jury to enable us to take the opinion of the Court. According to the direction he gave, it would appear, that it is quite sufficient to make a transfer of property void as against creditors, when it is made in contemplation of bankruptcy. That is the law laid down by the Chief Justice; but we submit that the law cannot be so taken, and that the bill of exceptions is well founded.

There are many cases where the question is, whether the transfer is voluntary, as well as done in contemplation of bankruptcy. In every case there has always been something more required to be done than the contemplation of bankruptcy. It must always have appeared that there has been some voluntary act on the part of the bankrupt, or some fraud or collusion. In *Thompson v. Freeman*, 1 Term Rep. 155, Lord *Mansfield* says, “a bankrupt, when in contemplation of his bankruptcy, cannot by his voluntary act favour any one creditor; but if, under fear of legal process, he gives a preference, it is evidence that he does not do it voluntarily; and the defendant in this case had taken no steps to secure himself in case he was called upon; yet the bankrupt, acting from mistake, was under the same apprehension of legal process as if the defendant had actually threatened her, so that her executing the warrant of attorney was not a voluntary act, but the effect of fear, however groundless that might be.” So that there Lord *Mansfield* considers that it is not sufficient that it is done in contemplation of bankruptcy, but that it must be a voluntary act. The next is the case of *Hartshorn v. Stodden*, in 2 Bos. 582, where Lord

Alvanley says, “ Nor has it ever been held, that if a creditor press for payment, and thereby obtains goods, that the intention of the bankrupt shall be called in aid to set aside the transfer. If the goods be delivered through the urgency of the demand or the fear of prosecution, whatever may have been in the contemplation of the bankrupt will not vitiate the proceeding.”

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Lord *Ellenborough* : — I wonder how it was possible to extend this case beyond one sheet of paper ; for if you had stated that the bankrupt had made this transfer in contemplation of bankruptcy, and that the judge directed the jury without calling their attention to the circumstance whether the transfer was voluntary, then you would have had nothing further to do than to have alleged that such question was material to be put to the jury, and so have framed your bill of exceptions.

Mr. *Scarlett* : — The question of a voluntary transfer was not suggested at the time of the trial.

Lord *Ellenborough* : — It is much to be lamented if all was not put to the jury that ought to have been put. You may have a *venire de novo*. Can you, Mr. *Scarlett*, contend, upon this state of things, that you can sustain your verdict?

Mr. *Scarlett* : — Then I ask whether, upon the whole face of the case, it is not so clear it was a voluntary transfer that it was unnecessary for the judge to put that point to the jury?

Mr. Justice *Bayley* : — Admitting it to appear as clear as you suppose, yet was it not for the jury to exercise

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their discretion and judgment; but the point is never submitted to them.

Mr. *Scarlett* :— What the Chief Justice put was this: there was not any threat; it was the man's own suggestion at the moment; the only question was, whether at the time he contemplated bankruptcy.

Mr. Justice *Le Blanc* :— The conclusion may be right; but the only question is, whether the means of drawing the conclusion were presented to the jury in the way they ought to have been?

Lord *Ellenborough* :— We are not considering whether, if there had been no direction at all to the jury, we should grant a new trial; but the question is brought to this simple point, whether the Chief Justice, in saying that the only thing for the jury to consider was the contemplation of the bankruptcy, did not leave out and exclude another important consideration?

Mr. *Scarlett* :— There was not the least threat of a prosecution. I have always thought a preferable transfer was invalid, unless there was a threat of a prosecution or an action.

Mr. Justice *Bayley* :— The transfer must be voluntary, in opposition to a transfer by pressure and urgency on the part of the creditor. Here *De Tastet* goes to his debtor, and he says, I understand your affairs are bad, and I *must* have something.

Lord *Ellenborough* :— A voluntary preference means a preference in favour of a particular creditor, not an

accidental payment arising out of immediate circumstances. It must be a payment for the purpose of favouring the creditor.

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Mr. *Scarlett* : — There certainly was no pressure.

Mr. Justice *Bayley* : — I differ from you. When *De Tastet* found that instead of good bills he had got forged ones, he became alarmed, and remonstrated with *Parry*. It terminated by his going with *Parry* to the different places where *Parry* had property. I think there is evidence, and strong evidence, of pressure; and I think you would be in great hazard if you could induce us to give judgment in your favour.

Lord *Ellenborough* : — There must be a *venire de novo*.

The Court ruled accordingly.

The cause was again tried in Trinity Term 1815, before Lord *Ellenborough*. The case is reported in 1 *Starkie*, 88; and there is another statement, in this volume, *ante*, 146. His Lordship stated to the jury, “ that, in order to reduce or set aside a transfer or disposition of property under such circumstances, the law requires that the preference should be voluntary, and in contemplation of an act of bankruptcy. That it was in contemplation of an act of bankruptcy there can be no doubt, for *Parry* must have known, about the time, that, if he did not take himself soon off, he would be subjected to the criminal law of the country, and be brought to punishment in a court of justice for his crime. You must take his absconding, therefore, as an act of bankruptcy committed ;

Third Trial,
Trinity Term,
1815.

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DE TASTET.
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of
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but, while you do so, the act done, as to the disposition of his effects, must have been done voluntarily; and whether, in this instance, the act which has taken place can be stated to have been done voluntarily or importunately, it is your province to determine. After the acts which the evidence has disclosed to you that he has committed, you are to say whether he has made this transfer and disposition of his property voluntarily or not. That is the only question which remains for you to decide.”

The counsel for *Carroll* submitted, that there was a distinction between the pressure of a creditor in ordinary cases and the apprehension arising in the mind of a criminal person; and whether that would not be such a ground as would not entitle the guilty person so to deal with the property of *Latham* and *Parry*; but the Lord Chief Justice observed, that if any thing was to be found which overcame the free will, it ceased to be a voluntary preference, and that *Parry* had, at that time, as much as any other, *jus disponendi* of the property, as a partner of the house of *Latham* and *Parry*.

The jury thereupon began to deliberate on their verdict, and, before they returned the same, one of the jurors inquired of his Lordship, if the question they had to consider was, whether there were any restraint on the part of Mr. *De Tastet* and Mr. *Gorst*, or whether it were a voluntary one on the part of *Parry*? To which his Lordship replied, that if it were a voluntary act on the part of *Parry*, the transfer in question would be void; but if it were from intimidation, or even from inconvenience apprehended, yet, as being a complete act of apprehension, it was not voluntary: in either case, the person who had got the advantage of such payment was entitled to retain it. The jury thereupon found

a verdict for *De Tastet*. An application was afterwards made to the Court of King's Bench, by *Carroll*, for a new trial; which was refused, upon the ground that the case had been properly left to the jury upon the single question, whether the transfer was voluntary or not?

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From Trinity Term 1815, until the 12th of December 1822, no application was made to the Chancellor by Mr. *De Tastet*, for the money which had been paid into court to abide the event of the suit.

Lapse of time
between ver-
dict in K. B.
and application
for money.

On the 12th of December 1822, a petition was presented by Mr. *Carroll*, praying that the property might either be delivered over to him, for the benefit of the general creditors, or that a new trial should be directed.

Dec. 12,
1822.
Petition to
Lord Eldon
on which issue
was directed.

This petition was heard on the 1st of December 1825, when Lord *Eldon* intimated his opinion, that the question had never been properly tried in the Court of King's Bench, if that Court were of opinion that any pressure, that is to say, a pressure through a threat of a criminal prosecution, was sufficient to enable a party to hold property obtained under it; and his Lordship postponed his judgment.

L. C.
Dec. 1.
1825.

On the 30th April 1827, in the morning, Lord *Eldon* wrote and forwarded to the office of the secretary of bankrupts the minutes of an order on this petition; and, on the same day, after having so written them, his Lordship resigned the great seal.

Retirement
from office of
Lord Eldon,
April 1827.

The minutes of the order were delivered out by the secretary of bankrupts, on the 16th of May 1827; but the solicitor for Mr. *De Tastet* objected to the order being delivered out, on the ground that the late Lord Chancellor could not sign the order.

On the 9th of July 1828, Mr. *Carroll* applied to Lord *Lyndhurst*, that the order should be delivered out; and

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In the matter
of
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and another.
Order,
April 30,
1827.

in October 1828 his Lordship was pleased so to order; and the order, which was signed on or after the 25th of November 1828, was delivered out accordingly. (a)

It was dated on the 30th of April 1827, and ordered as follows:—

“ I do order that the parties do proceed to a trial in his Majesty’s Court of Common Pleas, at the adjourned sittings to be holden, in London, after Trinity Term now next ensuing, on the following issue:

“ Whether, regard being had to the facts and circumstances under which the delivery and transfer of the property in question, or any part thereof, was made, such delivery and transfer of the said property, or any part thereof, was fraudulent and void, as against the creditors of the said *Thomas D. Latham* and *Joseph Parry*, or either of them, as made in contemplation of bankruptcy, or as made under such apprehension of proceedings that might take place, in case such delivery and transfer was not made, as would render such delivery void or fraudulent. And I do order that the said bill of exceptions, in the said petition mentioned as having been tendered to and allowed by the said Lord Chief Justice of the Court of Common Pleas, be read in evidence on the trial of the said issue.” (b)

(a) This appears from the following minutes of the order in the secretary’s office:—

“ LORD CHANCELLOR.

“ Monday, 30th April 1827.

“ In the matter of *Latham ex parte Carroll*.

“ 25th November 1828.

“ Ingross order for signing by Lord *Eldon*. Send the order to me when ingrossed. W. B.’

(b) The following is a correct copy of the order:—

“ By an order dated the 30th day of April 1827, Lord *Eldon* was pleased to order to the following effect, upon the petition of your present petitioner; that is to say, “ and the said petition having come on for re-hearing before me finally on the 1st day of December 1825, when, upon

On the 14th of February 1829, Mr. *Carroll* presented a petition, stating that the order could not be obtained from the secretary's office until the 8th of February 1829, and that the time appointed for the trial of the issue had elapsed.

The petition prayed, that another day should be appointed for the trial of the issue.

hearing the said petition read, and what was alleged, as well by the counsel for the said petition as for the respondent the said *Firmin De Tastet*, I did think fit to postpone my judgment thereon, and the matters of the said petition standing for my judgment. I do order, that the parties do proceed to a trial at law, in his Majesty's Court of Common Pleas, at the adjourned sittings to be holden for the city of London after Trinity Term now next coming, upon the following issues; viz. Whether, regard being had to the facts and circumstances under which the delivery and transfer of the property in question was made, such delivery and transfer of the said property, or any part thereof, was fraudulent and void as against the creditors of the said *Thomas D. Latham* and *Joseph Parry*, or either of them, as made in contemplation of bankruptcy, or as made under such apprehension of proceedings that might take place, in case such delivery and transfer was not made, as it would render such delivery void or frau-

dulent; in which said issue the said petitioner *George Carroll* is to be plaintiff, and the said *Firmin de Tastet* defendant, who is to name an attorney to appear for him, receive a declaration, and plead to issue; and it is hereby referred to the Master of the Court of Chancery in rotation to settle such issue between the parties, if they differ about the same. And I do order that the said bill of exceptions, in the said petition mentioned as having been tendered to and allowed by the Lord Chief Justice of the Court of Common Pleas, in the said action of trover brought by the said petitioner against the said *Fermin de Tastet*, and which said bill of exceptions bears date the day of , be read in evidence on the trial of the said issue; and that as well the said plaintiff and defendant, as all other proper parties, do severally produce upon the said trial all books, papers, and writings in their or either or any of their custody or power relating to the matters in question, as either of the parties shall require, upon

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DE TASTET.
In the matter
of
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and another.

Feb. 14,
1829.

Carroll's petition to enlarge trial of issues.

1831.

Ex parte
DE TASTET.
In the matter
of
LATHAM
and another.

April 7,
1829.

De Tastet's
petition to dis-
charge Lord
Eldon's order.

On the 7th of April 1829, Mr. *De Tastet* presented a petition to Lord *Lyndhurst*, stating the former petition; and that the late Lord Chancellor, on the morning of the 30th of April 1827, wrote, and afterwards forwarded to the office of the secretary of bankrupts, the minutes of an order on the petition of the 12th day of December 1822; and that such order was afterwards drawn up, and dated the said 30th day of April 1827; and that the same was signed by the late Lord Chancellor, and delivered to the solicitor for the said *G. Carroll*, on or about the early part of the month of February 1829.

Dec. 1822.

The petition prayed, that the petition presented by *G. Carroll* on the 12th day of December 1822 might be reheard; and that the order of the 30th of April 1827 might be discharged.

15th, 16th,
20th, and
21st Jan.
1830.

On these days, the petitions of Mr. *Carroll* to enlarge the time for the trial of the issue, and of Mr. *De Tastet* to discharge Lord *Eldon*'s order, were heard by Lord *Lyndhurst*.

Sir *Edward Sugden*, Mr. *Pepys*, and Mr. *Koe*, for Mr. *De Tastet*.

The objections to Mr. *Carroll*'s claim were, 1st, That the case ought not to have been entertained by Lord

reasonable notice to be given for that purpose. And I do farther order, that the judge before whom the said issue shall be tried be at liberty to indorse on the postea any special matter; and I do reserve all further directions on the subject matter of the said petition, and also the costs of and occasioned thereby, until after the trial of the said issue; and any of the parties are to be at liberty to apply to the Court in relation thereto, as they shall be advised, when such further order shall be made as shall be just."

Eldon, not only from the lapse of time, but because the application ought to have been made to a court of common law. 2dly, That no order was made by Lord *Eldon* when chancellor. 3dly, Even if it had been made, that the law was mistaken.

Without professing to be admirers of improper dispatch (a) in the administration of justice, we submit that the application is too late, and ought not, in the year 1825, to have been entertained by Lord *Eldon*. The Court ought not, after the conclusion of ten years litigation, and after the solemn decision of the Court of King's Bench, in which Mr. *Carroll* acquiesced for seven years, to have listened to an application to renew the contest, through every court in Westminster Hall, for ten years more.

It will, of course, be said, that the application might as well have been made by Mr. *De Tastet* as by Mr. *Carroll*. But the difference between the situation of Mr. *Carroll* and Mr. *De Tastet* is obvious. Mr. *Carroll* was trustee for all the creditors, and, if dissatisfied with the decision, it was his duty instantly to have applied to the Court; but, as no application was made by Mr. *Carroll*, Mr. *De Tastet*, of course, considered that he acquiesced in the decision. To Mr. *De Tastet*, opulent as he is, it was not a matter of life or death, whether he had the property tied up for a time or not: the money was safe, the interest accumulating, and every hour Mr. *Carroll* remained silent shewed his acquiescence in what had been done in the Court of King's Bench, and strengthened Mr. *De Tastet's* case.

(a) See Lord *Bacon's* Essays Chancery, where the nature of on Dispatch and Delays; and see true and affected dispatch is particularly his speech upon his explained. taking his seat in the Court of

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Lyndhurst (Chancellor) : — I see that Lord *Eldon* refers to this fact; and Mr. *Agar*, who was then in the case, says he cannot explain it.

Mr. *Solicitor General* : — No, my Lord, Mr. *De Tastet* is a man of great wealth.

Application to
 common law.

The application for a new trial ought not to be made to this Court, but to the Court of Common Law. *Folkes v. Chad, Dickens*, 576; *ex parte Kensington, G. Cooper*, 96; and *Booth v. Blundell*, 19 *Ves.* 500.

Signing out of
 office.

In bankruptcy an order is not of any validity, until it is signed by the person holding the great seal. That it must be signed, is proved by every day's practice. It is not the pronouncing the order, nor is it the reducing the judicial declaration into minutes, which constitutes the order, but it is the actual signature. Upon pronouncing an order for a supersedeas, or upon reducing it into minutes, the supersedeas will not issue; it will issue only when the order is signed. The same is the case of any other order, as is confirmed by the proceedings, or rather by the not proceeding, in this very case; for, if the signature of the order had not been requisite, Mr. *Carroll* might have proceeded to the new trial when or before the minutes were signed. We submit, therefore, that the order to have validity must be signed; and, if the signature is to give validity to the order, can it be said, that it may be signed, not by the person who holds the great seal, but by the person who held it two or twenty years ago. There is no authority for such doctrine. Lord *Eldon* quitted office on the 30th day of April 1827. The order was not signed until the 25th day of November 1828, and is, therefore, of no validity.

If it is said, that an order in a cause may have some validity before it is actually signed, it is to be remembered, that the proceedings in bankruptcy are not analogous to the common proceedings in equity. The Chancellor presides in bankruptcy by an authority delegated to him as to any other commissioner, and he must act in conformity with the practice by which the proceedings are regulated; and by this practice the signature to an order is necessary, before the order can have any validity.

Having disposed of these points, which are more of form than of substance, the question in dispute is simply, whether this was a voluntary preference of Mr. *De Tastet* by *Parry*, so as to be voidable by the assignees.

Even supposing the question had not been settled at law, where, after full argument and a review of all the cases, it has been decided by two judgments of the Court of King's Bench, it is clear that this is not a voluntary preference, but, as is obvious, a compulsory transfer; and it has been decided by an uniform series of cases, founded on established principles, that a transfer, made in consequence of a well or ill founded fear of legal process, is valid. It is settled in all the cases, that, although the law will not permit a debtor to select a creditor whom he may wish to prefer, it will encourage rather than prevent a creditor in obtaining the fruits of his own vigilance. It has been said, that there is a difference between the pressure of civil and criminal process, and that the cases are confined to civil pressure; but the principle is the same in both, that the transfer is not from the free will of the debtor, and his anxiety to serve a friendly creditor, but from the compulsion of the creditor, which, to say the least, is as strong in the case of a threat of criminal as of civil process.

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It is, however, too late now to agitate this question, as it is a legal question, and has been solemnly settled at law, after a full investigation of this imagined difference. It is expressly stated in the case, that the counsel for the said *George Carroll* submitted, that there was a distinction between the pressure of a creditor in ordinary cases and the apprehension arising in the mind of a criminal person, and whether that would not be such a ground as would not entitle the guilty person so to deal with the property of *Latham* and *Parry*; but the Lord Chief Justice observed, that if any thing was to be found which overcame the free will, it ceased to be a voluntary preference, and that *Parry* had, at that time, as much as any other, *jus disponendi* of the property, as a partner of the house of *Latham* and *Parry*.

Mr. *Pemberton*, Mr. *Knight*, and Mr. ——— for Mr. *Carroll*: —

Delay.

From the observations which have been made upon delay, it might be supposed, that some person was making a complaint, who had been kept out of his property by the litigious spirit of his adversaries, instead of the fact being, as it is, that Mr. *De Tastet* is himself the cause of the delay. He obtained the verdict. He was entitled to receive the property under the judgment. It was his duty and interest to apply for the money; but, instead of applying, he does not present his petition, which he might have done the day after the trial, in the year 1815, calling for a transfer of the 50,000*l.* or 60,000*l.*, until February 1829. Even, therefore, if any injury had accrued from the lapse of time, his neglect would have furnished an answer to this objection.

But, in point of fact, Mr. *De Tastet* is not prejudiced by the delay. Mr. *Carroll* may be prejudiced, but

Mr. *De Tastet* cannot. He gave no evidence at the trial; he can have no witnesses dead. It lies upon us to establish the case. Our witnesses may be dead, but his cannot be. With respect to the delay, therefore, we might, he cannot, complain. We came forward in 1822; Mr. *De Tastet* never stirred till 1829; and we were, in consequence of his delay, compelled to apply to the Court. That the case remained some time for judgment was not the fault of Mr. *Carroll*, by whom applications were repeatedly made to the Court; nor was it the fault of any person, unless it is a fault that causes should be fully heard, and deeply considered, before they are decided.

It has been said, that Mr. *De Tastet's* opulence rendered it a matter of small importance to him, whether the 100,000*l.*, which he might have for asking, was paid on this day or on that day, provided it was ultimately safe. Lord *Eldon* did not think this a very satisfactory explanation; nor does it seem to meet with your Lordship's approbation; but the real solution of the difficulty is, that Mr. *De Tastet*, who acts upon very good advice, thinks it better that he should lose the advantage he might make by possession of the money, than lose the chance of success, by Lord *Eldon's* not acquiescing in the decision of the Court of King's Bench, opposed as it is by the confirmed opinions of the Chief Justice of the Court of Common Pleas.

With respect to the objection, that this is an application for a new trial of an action at law, and that no such application can be made in this Court, the answer is easy. We do not dispute, that, according to the usual practice, a motion for a new trial of an action must be made to the court of law, and that, where the trial has been the trial of an issue, the application must

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be made to the Court of Equity. This is the proposition proved by the cases which have been cited. When the question ought to be determined at law, being purely a question of law, the Court will direct an action to be brought, and leave the parties to proceed in a court of law. If, on the other hand, it desires to have certain facts ascertained for its own satisfaction, it will retain controul over the proceedings, and a new trial, if the first trial is not satisfactory, will be directed: but these cases do not decide that a court of equity will dispose of property in its custody, against its own conviction, or against those rights which the Court itself believes to be just. The contrary doctrine is laid down in all the cases. It is laid down repeatedly by Lord *Eldon*. It is laid down by Lord *Eldon*, in the case of the Minor Canon of St. Paul's and others, that, where a court is called upon to act, it will act upon its own conviction, whether upon matters of law or of fact: although, for the purpose of enabling it to arrive at a proper conclusion, it may take the opinion either of a court of law or of equity, for the purpose of its arriving at that sound and proper conclusion.

The foundation of the jurisdiction of this Court, or rather the main principle on which it acts, being, that it acts on its own conviction of what is proper to be done, and takes the assistance of other courts in certain cases, not to be controlled, but to be advised. If this was not the practice of the Court, although Lord *Eldon* was dissatisfied, and although your Lordship is dissatisfied with the way in which the case was tried, and are both convinced that Mr. *De Tastet* was not entitled to this 70,000*l.* or 80,000*l.*, but that the general creditors are entitled to it, yet your Lordship being called upon to act, you are to give, against the conviction of your own mind, the

70,000*l.* or 80,000*l.* to Mr. *De Tastet* as his, to whom it does not belong. A new doctrine in a court of equity! If, in the present case, the court had determined that the matter in dispute was one of legal cognizance, which it entered into merely for the purpose of enabling the parties to try those legal rights which they would not otherwise have been able to try, it would then have made an order that Mr. *De Tastet* should not have set up his character of assignee, and there it would have left the question. But, on the contrary, it has ordered the money to be paid into Court, and has directed these proceedings at law, to satisfy its conscience as to the disposal of it.

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It has been said, that Lord *Eldon*'s order is of no validity; that it never was signed by Lord *Eldon* during the time he had the Great Seal; and that, not having been so signed by him, the order is good for nothing.

Signing out of
office.

There is, however, no weight in this objection. After a judge has pronounced an order, it has never been doubted but that it may afterwards be drawn up and signed by him, and that the signature has relation to the day on which the order was pronounced.

If this is not the case, decrees without number have been improperly made. The decrees which were signed after Lord *Thurlow* quitted office, which have never been doubted, are invalid; and the numerous decrees signed since Lord *Eldon* went out of office must share the same fate.

That an order is binding from the moment it is pronounced will not be denied. It will not be denied that a party having notice of an order is bound. Mr. *De Tastet* will not deny that he might have been committed for the violation of this order, though not signed. If an order for an injunction is pronounced, a party disobeying it, with notice, may be committed.

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It has been done by Judges who knew very well what they were about, and to an extent that went far beyond any thing we ask for here. Here is a written judgment: the minutes are, to all intents and purposes, an order of the Court; they were delivered out while Lord *Eldon* held the Great Seal (*a*); they were the result of a judgment which he formed upon argument.

It has been assumed throughout the whole of the argument, that the signature of the Lord Chancellor is necessary to give validity to an order in bankruptcy; but there is no authority for this assumption. There is not any order requiring the signature; and although it is usual that the Judge should with his own hand sign the order, yet if a Lord Chancellor or Vice-Chancellor should direct the officer to draw up the order without the signature, and the Lord Chancellor or Vice-Chancellor should say, "that is my order," can any man assert that such an order ought not to be obeyed? The signature of the Lord Chancellor does not make the order. The signature can do no more than authenticate the order which he has pronounced. The signing an order is merely to authenticate what the Judge has done. That authentication does not become of less value, because the individual signing it is no longer in the situation in which he was when he pronounced it. If a Judge dies before the signature of the order which he has pronounced, is the order of no validity?

To obviate the effect of this reasoning, it has been said, that the Lord Chancellor, sitting in bankruptcy, exercises a special jurisdiction, and, therefore, that the general law of the Court is not applicable to the case of bankruptcy. But where is the difference? The jurisdiction is vested in the Lord Chancellor by act of

(a) See *ante*, 166.

parliament ; he acts in his character of Chancellor ; and the proceedings in bankruptcy are formed by analogy to the proceedings of the Court as a court of equity. *Ex parte Bax*, 2 *Ves. sen.*, 388.

It is rather extraordinary, that this objection, upon which so much reliance has been placed, did not occur to the gentleman by whom the petition was framed ; for the Court is called upon, not to discharge the order for irregularity, but simply to rehear it as a good order. At all events, whether the order is or is not in form valid, it is in substance the order of Lord *Eldon*, made after the most mature deliberation.

If we do not lose sight of the facts, there cannot be any difficulty in applying the law.

The short statement of the facts is, that *Parry*, convicted by his own confession of forgery, went with Mr. *De Tastet* out of the room, and remained out of the room with Mr. *De Tastet* for half an hour : that he then came back, and said, “ he believes the matter can be settled ; he thinks Mr. *De Tastet* can be reconciled, and hopes it will not be exposed ;” this takes place on the Thursday, on the Friday, and on the Saturday, on which day *Parry* absconded ; and, on the Monday morning following, Mr. *De Tastet* sent for a Bow-street officer, and went to *Parry*’s counting-house : that is, when the debtor has escaped, then, and not till then, the creditor sends for an officer, and affects to be zealous in having him arrested and brought to justice.

Upon these facts it has been argued, that the only question is, whether this transfer was a voluntary transfer ? But the question is of a different character ; it is, whether a creditor, knowing that his debtor has committed a felony, and having that debtor in his power, can abandon a prosecution against that debtor, and per-

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Transfer in
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 of bankruptcy.

mit him to escape, in consideration of obtaining from that debtor, the moment before he committed an act of bankruptcy, a transfer, either of his own property, or the property of the bankrupt, or the property of the bankrupt's creditors; and this was the view of the question, as taken by Lord *Eldon*, who directed an issue to try the legal validity of this transaction, not merely upon the ground of voluntariness in contemplation of bankruptcy, but on the ground of general invalidity.

That the transfer was made in contemplation of bankruptcy, is obvious; for the substance of what took place was Mr. *De Tastet's* saying to *Parry*, "I have the means of prosecuting and convicting you, and, having those means in my power, unless you fly the country, they will be carried into execution. I will enable you to fly the country; that is, I will enable you to commit an act of bankruptcy, if you will let me have this property. You must let me have it, otherwise you will be tried, convicted, and executed."

So, too, Lord *Ellenborough* said, "That it was in contemplation of an act of bankruptcy there can be no doubt, for *Parry* must have known, about the time, that, if he did not take himself soon off, he would be subjected to the criminal law of the country, and be brought to punishment in a court of justice for his crime. You must take his absconding, therefore, as an act of bankruptcy committed." (a)

The question is, whether property thus obtained from a man who knows that he must commit an act of bankruptcy, is not in fraud of the bankrupt laws?

Criminal
 pressure.

That the transfer was made from the fear of criminal proceedings, is too obvious to require proof. The only

(a) *Ante*, 163.

question is as to the legal consequences ; with respect to which it has been said, that any pressure is sufficient to destroy the voluntariness. Our complaint is, that the voluntariness of the act was made in the Court of King's Bench the sole question to be tried ; and that neither the distinction between civil and criminal pressure, nor the nature of intention from the necessary consequences of *Parry's* act, were noticed.

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This has been supposed to resemble the transfer of property from the fear of civil process, with which it has no resemblance ; except that, in both cases, there is the fear of legal process. Mere civil pressure.

No doubt can be entertained of the legal consequence of a transfer, by a trader, of part of his property, from the threat of civil process. It is clear, that when a debtor, either in the regular course of business, or from the fear of civil process, transfers such a part of his property as will not incapacitate him from trading, the transfer is valid. (a) The cases upon this subject are uniform, and the principle is clear.

The object of the bankrupt laws is to secure an equal distribution of a bankrupt's property among all his creditors ; to effect this, it requires that the bankrupt, when in difficulty, shall act with impartiality to all his creditors, and not favour any particular creditor. Such is

(a) *Ex parte Scudamore*, 3 Ves. 85 ; Lord *Alvanley's* judgment in *Hartshorn v. Stodden*, 1 Bos. & Pull. 582 ; *Jacob v. Shepherd*, 1 Burr. 478 ; *Forcroft v. Devonshire*, Burr. 938 ; *Alderson v. Temple*, 4 Burr. 2235 ; *Linton v. Bartlet*, 3 Wils. 47 ; *Harman v. Fisher*, Cowp. 117 ; *Rust v. Cooper*, Cowp. 629 ; *Devon v. Walls*, Doug. 86 ; *Butcher v. Easto*, Doug. 282 ; *Hassel v. Simpson*, Cooke, 110 ; *Thompson v. Freeman*, 1 Ter. Rep. 155 ; *Cosser v. Gough*, 1 T. R. 156 ; *Smith v. Payne*, 6 T. R. 152 ; *Singleton v. Butler*, 1 Bos. & P. 283.

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the duty which the law requires from the bankrupt. In *Harman v. Fisher, Cowp.* 117, Lord *Mansfield* says, “If a trader can give a preference to one creditor, he can give it to another; which would establish the principle, that a bankrupt may apportion his estate amongst his different creditors as he thinks proper.” So, too, in *Round v. Byde, Cooke,* 91, Lord *Mansfield* says, “I take it to be clear law, that if, in contemplation of bankruptcy, a man conveys to the fairest creditor that ever existed, it is not fraudulent as between them; but it tends to defeat the whole bankrupt laws, and as such is held to be a fraud on the rest of the creditors.”

Upon this principle, thus stated by Lord *Mansfield*, the law will not permit a debtor to be active in preferring a friendly creditor. But, although the law will not permit a debtor to prefer a friendly creditor, it will not prevent his activity to save himself. The law will stand by him in the storm, as long as he stands with firmness and acts with caution. If, therefore, a creditor presses for payment, either by importunity or threat of legal process, the law will permit him to avert the calamity by payment of the debt; that is, it will permit him to attend to the interest of his creditors, by attending to his own interest. In *Jacob v. Shepherd, A. D. 1725, Burr.* 478, Lord *Mansfield*, in accounting for the validity of the instrument, says, “Most probably he was frightened into giving this security, by threats of legal diligence against him.” So, in *Alderson v. Temple, Burr.* 2235, Lord *Mansfield* says, “If a creditor threatens legal diligence, and there is no collusion, or begins to sue a debtor, and he makes an assignment of part of his goods, it is a fair transaction, and what a man might do without having any bankruptcy in view.” So, in *Linton v. Bartlet,* 3 *Wils.* 47, Lord *Mansfield* says, in commenting on

Harman v. Fisher, Cowp. 117, "The material circumstances which made that a fraudulent act, which was an assignment on the eve of the bankruptcy, are these; the brother did not arrest or threaten, or even call upon the bankrupt for the money, but the bankrupt, of his own voluntary act, gave him the assignment." In *Harman v. Fisher*, Lord Mansfield also says, "If a man were to make a payment but the evening before he became bankrupt, independent of the act of parliament, and in a course of dealing and trade, it would be good; or suppose legal diligence used by a creditor, and an execution or *ca. sa.* in the house, and under terror of that he makes an assignment and delivery of his effects, it would be valid; the object not being to give a preference, but to deliver himself." So, in *Rust v. Cooper*, Lord Mansfield says, "Suppose a creditor presses his debtor for payment, and the debtor makes a mortgage of his goods, and delivers possession; that is, and at any time may be, a transaction in the common course of business, without the creditor's knowing there is any act of bankruptcy in contemplation, and therefore good." There are various other cases to the same effect. (a) The principle which pervades all these cases is stated in a few words, in *Harman v. Fisher, Cowp.* 117, "The assignment is valid; the object being, not to give a preference, but to deliver himself;" that is, in other words, the law will not prevent his attending to his own interests, if, by so doing, he, by preserving himself, may promote the interests of his creditors. But, although the law will thus attend to the interests of a trader in difficulty, it will not neglect

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(a) *Hassel v. Simpson, Cooke, parte Scudamore*, 3 Ves. 85; *Hartshorn v. Slodden, Bos. & Pull.* 582; *Thomson v. Freeman*, 1 T.R. 155; *Cosser v. Gough*, 1 T.R. 156; *Singleton v. Butler*, 1 Bos. & Pull. 283; *Smith v. Payne*, 6 T.R. 152; *ex*

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his creditors, by exposing them to any of the wild or fluctuating motives which may influence despair. It, therefore, looks with great jealousy upon the conduct of an insolvent, and will not permit him, whatever may be his immediate motive, to do any act by which, in its necessary consequence, the creditors might be injured. It says, in such cases, he must intend to prefer, when the necessary consequence is preference. If, therefore, he assign the whole of his property, or so much as, when carried with effect, will incapacitate him from trading, the assignment, whether in the course of business, or from fear, or from any other motive, is void. *Hooper v. Smith*, 1 *Blacks.* 441; *Alderson v. Temple*, 4 *Burr.* 2239. It matters not what the immediate or proximate motive may be, the consequences being clear. In *Devon v. Watts*, *Doug.* 88, an assignment by a trader of the whole of his property, was declared void, although, at the time of making it, he was under the influence of fear. So, too, in *Thornton v. Hargreaves*, 7 *East*, 544, where a trader, upon being pressed for payment, assigned the whole of his property, the assignment was declared void.

In this case the counsel said exactly what has been said by Mr. *De Tastet*:—"This cannot be said to have been a *voluntary* payment made in contemplation of bankruptcy in favour of a particular creditor; the circumstances shew that he made it unwillingly, after having in vain endeavoured to evade and postpone the demand. If the defendants had sued out a writ against him under which the payment had been obtained, there could have been no doubt of its validity; but there was no necessity for that when the end was obtained by the threat of it. The question of fraud was distinctly left to the jury, and negatived by their verdict. And he referred to *Hartshorn v. Slodden*, where Lord *Alvanley*, under somewhat similar circumstances, said, that "if the

goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding."

But Lord *Ellenborough* says, "The only difficulty which lies on the plaintiffs in this case, is to make out that this was a *voluntary* payment on the part of the bankrupt; for that bankruptcy was contemplated by him when he made the bill of sale, all the evidence strongly shews. But, taking the conversation reported between the defendants and the bankrupt to be a threat of process, if they did not receive payment or security for their demand, I do not see how the execution of such a threat could put the bankrupt in a worse situation than the actual transfer of the goods did; for that left him without any property, and he was immediately obliged to break up his business and leave his home. This would rather shew that he did not make the transfer by dint of the threat; for he did not redeem himself even from any present difficulty by doing the act, which is the motive for such an act when really done under the pressure of a threat. And if he got nothing by evading the threat, I should rather say that it was a voluntary act and preference on his part as to the particular creditor."

Such being the law, and such the principle on which it is founded, what resemblance has the transfer of property, from the fear of civil pressure, where the debtor by saving himself may serve his creditors, to the transfer of property by criminal pressure, where the object of the debtor is, not that he may serve his creditors by saving himself, but that he may abandon his creditors by escaping from justice? What resemblance is there between a debtor endeavouring to stand his ground, by averting the publicity of an action, to a debtor saying to a particular creditor, "I have committed felony, but if

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you will not prosecute me, if you will suffer me to escape, I will give you property sufficient, or more than sufficient, to cover your demand?

In *Woodier's* case, *B. N. P.* 39; *Raikes v. Poreau*, *Cooke*, 73; *Vernon v. Hankey*, *Cooke*, 95; and *Fowler v. Padget*, 7 *T. R.* 509, it is settled, that if a trader depart the realm to avoid a criminal prosecution, or in defiance of such rules of morality as to manifest a neglect of the interest of his creditors, he commits an act of bankruptcy. The principle of which is explained by Mr. Justice *Lawrence*, in *Fowler v. Padget*, who says, “ I think that *Woodier's* case and the case of *Raikes v. Poreau* might have received the same determination, though on a different ground; for though it was not the immediate object of the parties in those cases to delay their creditors by going abroad, yet as that must be the necessary consequence of such an act, it would be evidence of their intending to delay or defeat their creditors, and so it would come within the construction of the statute now contended for by the plaintiff.”

Assuming for a moment, that Mr. *De Tastet*, after he was acquainted with the fact of the forgery committed by Mr. *Parry*, had engaged with Mr. *Parry* not to prosecute him, if he (Mr. *Parry*) would give up to him (Mr. *De Tastet*) this property, will any lawyer venture to contend, that the property obtained by Mr. *De Tastet* could have been held by him? If that be so, the next question will be, whether the circumstances do not amount to this? whether the facts of this case do or do not present to the Court a case upon which a jury must draw the inference that such an agreement had taken place? Upon the whole, will your Lordship, in this state of facts, and when, upon the case, such opinions have been expressed by Sir *James Mansfield* and Lord *Eldon*, take upon yourself to say that the pro-

ceedings should terminate, because the question has been decided at law in such a way as ought to bind the rights of the parties to the extent of 80,000l.?

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Lyndhurst (Chancellor): — After so many years of litigation, and after an acquiescence by one or both of the parties for so long a period, if the stake were not so great, and the opinions of *Sir James Mansfield* and Lord *Eldon* were not entitled to the greatest consideration, I should not hesitate in saying, that the litigation ought not to be renewed; but the stake is so considerable, the opinions expressed are of such weight, and it is of so much importance that this question of law should be finally settled, that, notwithstanding the inconvenience with which it may be attended, I must consider whether the subject has been satisfactorily tried and concluded.

Although I certainly have thought, during the argument, that Lord *Eldon* had no authority to sign the order after he quitted office, and that the effect of signature was only to authenticate the order as having been pronounced by him; yet this is not of much moment, as I can make an original order, should I be of opinion that this is a proper case for a new trial. It would thus become a mere question of costs.

With respect to the propriety of the application to this Court, instead of a Court of Common Law, the only point is, Whether, if this Court sees that justice has not been done, and I should be satisfied that the question has not been properly tried, I may not direct an action to be brought? or, Whether, though I may be clearly satisfied that the judgment on the action was erroneous, I must act upon and give effect to that error?

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The substantial question then is, Whether this property, thus obtained from the threat of prosecution, can be retained?

That it was paid under pressure is quite clear; and the point is, What is the effect of the particular species of pressure used in this case — not of a threat to sue, but of a prosecution for forgery?

The counsel at the trial, I see, put that point to the learned Judge. Lord *Ellenborough* said, it was not the ordinary case of pressure, but of pressure arising from the apprehension of a criminal prosecution. Lord *Ellenborough*, therefore, had his attention called to it; and he said, “In my opinion, it makes no difference; if it is from pressure of any description that the transfer is made, it is no longer a voluntary act; if it is not a voluntary act, it is a good transfer.” That was brought under the consideration of the full Court of King’s Bench, and that Court was of opinion that the direction was right. It must have been, I think, upon the ground that Lord *Eldon* differed in opinion from the Court of King’s Bench upon that direction, that he made this order.

It is a very short question; viz. Whether this point was properly put to the jury by Lord *Ellenborough*? The whole case is now before me; the validity of the supposed distinction, and all the facts. From the respect I entertain for the noble Lord who pronounced the judgment, and from the extent of the sum at stake, I must look into the proceedings before I decide the case.

The case stood over for judgment, which was not pronounced when Lord *Lyndhurst* resigned the great seal.

Mr. *De Tastet* presented a petition for a reversal of the order (a) made by Lord *Eldon* on the 30th day of April 1827.

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Sir *Edward Sugden*, Mr. *Pepys*, and Mr. *Koe* for Mr. *De Tastet*:—

The petitioner is Mr. *De Tastet*, an opulent merchant, who, during the whole of these transactions, amidst a system of fraud by which he has been plundered, and of calumny by which, for no less than thirteen years, he has been vilified, has conducted himself with the greatest propriety.

Petition to
rehear Lord
Eldon's order
for new trial.

The LORD CHANCELLOR:— Mr. *De Tastet* ought to have been a very rich individual to have sustained all these expences. I for years remember this cause in the Courts of Common Law; and he, unless I am much mistaken, is the same person who had to pay 8,000*l.* for an undefended cause in the Court of Common Pleas. He has been in courts of law ever since I came into the courts, and it is time that he should be out of them.

Mr. *Knight*:— Mr. *De Tastet* had this verdict against him for 80,000*l.* He might, if he had thought proper, have called *Williams*, who was privy to the whole transaction; but Mr. *De Tastet* thought it safer to let his case go to the jury without any evidence. This Court, however, will not be thus misled. Before the conscience of the Court is satisfied, it will require the whole truth to be disclosed.

Sir *Edward Sugden*:— The petition by Mr. *Carroll*, upon which the order was made by Lord *Eldon*, is

(a) See the order in note, *ante*, 166.

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founded upon the supposition that the nisi prius judgment of Sir *James Mansfield*, in 1813, is (a) correct law; and the solemn judgment of the Court of King's Bench, in (b) 1815, reversing that judgment, is erroneous. They may be so. But, at least, the presumption is the contrary; and there will be no difficulty in shewing that the law, as expounded by the Court of King's Bench, is founded on precedent and on principle.

It is established by an uniform series of decisions, that to constitute a preference it is necessary that the transfer should be voluntarily made; the law does not, in defiance of its own maxim, "*vigilantibus et non dormientibus subveniunt jura*," prevent the creditor obtaining payment by means of his own vigilance, but solely prevents the debtor, by his own free-will, preferring any one of his creditors to the injury of the general body of creditors. The transfer, to be invalidated, must be made with the free-will of the debtor. The only dictum impugning this doctrine is the dictum of Sir *James Mansfield* in this very case. (c)

THE LORD CHANCELLOR:—This law has been overruled again and again. We all remarked, that when Sir *James Mansfield*, who undoubtedly was a very able lawyer, returned to nisi prius, he brought some strange doctrines back with him, both as regarded the law of real and personal property. The last case I argued in the Court of King's Bench was from Lancashire, and the pressure was in these words: "My sons, at Glasgow, have advanced to you 6,000*l*. I require a security, whereby, in the event of your bankruptcy, I may be safe." The only question was, Whether the bankrupt himself had moved him to ask for something? but as that was not

(a) See *ante*, p. 142. (b) See *ante*, p. 145. (c) *Ante*, p. 156.

proved, it was admitted not to have been voluntary. There was another case which I argued in the Court of Common Pleas. The case was this: There was a considerable sum received by a party, in payment from the bankrupt. Mr. Baron *Hullock* left it to the jury, whether it was a payment in contemplation of bankruptcy. I argued, that its being in contemplation of bankruptcy was not sufficient; for it might be under pressure: that if it was a voluntary payment, and in contemplation of bankruptcy, it was, these two requisites wanting, recoverable by the assignees; but if either was wanting it was not recoverable. The Court, without hesitation, granted a new trial.

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Sir *Edward Sugden*:—The present case is much stronger than either of the conclusive cases cited by your Lordship. The pressure upon *Parry* has not been attempted to be denied. No pressure could have been greater. No act was ever more involuntary than this act of Mr. *Parry's*.

The LORD CHANCELLOR:—The law is plain: there must be voluntariness and contemplation of bankruptcy both united. You may just as well desire me to say any thing, as to say that that is not the law; and that is the only question. It is not the less involuntary,—it is not the less compulsory,—that the compulsion is owing to the threat of a halter.

Mr. *Pepys* and Mr. *Koe*, who were on the same side, were stopped by the Court.

Sir *Charles Wetherell*, Mr. *Knight*, and Mr. *Beames* for the assignees.

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LORD CHANCELLOR:— Before you begin, I wish you to address yourselves to this: Supposing there were two pressures moving from or occasioned by the same person; from Mr. *De Tastet* on *Parry*; the one a pressure of a criminal nature; call it so for shortness; the other of a civil nature; can you contend, that, as the civil pressure would have done without the criminal pressure, it is nullified by that addition? can you contend, that the addition of the criminal to the civil pressure will make that voluntary which otherwise would have been compulsory?

The Counsel proceeded:— When the value of the property is considered, which is no less than 60,000*l.*; when the opinion of Sir *James Mansfield*, and the experience of the learned Judge by whom the order now sought to be reversed was made, are duly weighed; and the law and the principle of his Lordship's decision are duly weighed; it will appear, that there never was a case which more imperiously called for grave and deep consideration.

LORD CHANCELLOR:— The Courts of Law have again and again virtually decided this; for they have decided, that two things must be combined to make the transfer void,—voluntariness and contemplation of bankruptcy.

The Counsel proceeded:— We say that *Parry* did contemplate bankruptcy, and that the transfer, within the meaning of all the cases, was voluntary; that is, he acted with his eyes open to the injury of the general creditors. And upon this principle Sir *James Mansfield* and Lord *Eldon*, having due regard to the settled cases, and to the

principle of the law, decided. The words of the Chief Justice are: "What is the object of all this willingness of the bankrupt to put his property into Mr. *De Tastet's* hands, but to prevent his being prosecuted for forgery? How can we possibly understand the transaction in any other manner? And then, having transferred all this money into the hands of Mr. *De Tastet*, he immediately flies. It was known to Mr. *Mardell*; it was known to Mr. *Gorst*; it was known to Mr. *De Tastet*, and it was not denied by *Parry*, that he had committed a gross forgery; and the whole of this operation between Mr. *De Tastet* and *Parry* seems to have given him just time enough to transfer his property, and then for him to escape the hands of justice by flying abroad.

"There has been no case, I think, in which it has been decided that a man who is in such circumstances as *Parry* then was, with an inevitable bankruptcy to follow immediately on his quitting the kingdom, could transfer property to one creditor to the prejudice of all the rest. A great deal has been said to you as to the difference between voluntary payments and coercive payments by the bankrupt. If the creditor arrests the bankrupt, and the bankrupt, to redeem himself, puts property into the hands of the creditor, that he may hold under a commission founded on an act of bankruptcy committed afterwards; so, if a creditor, without being involved at all in any transaction as to the bankruptcy, goes to the debtor, and says, 'My debt is in danger, and I will have security, or I will arrest you to-day or to-morrow;' and the debtor, in order to prevent such an arrest, puts property into the hands of the creditor, he would be at liberty to hold it; but it does not, therefore, follow that a creditor, who has his debtor within his power, and can take away his life for a notorious forgery, can, under such circumstances, with an

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immediate bankruptcy to follow, take property from that debtor. And I have never myself seen a stronger case, (as this seems to me,) with respect to the right of the assignees to recover property so transferred from a debtor to a creditor."

We submit to your Lordship, that the law, as established by every decision for the last century, and confirmed by Sir *James Mansfield* and Lord *Eldon* in this very case, is, that an act done by a debtor, with intent to prefer his creditor, is, although valid as between the debtor and creditor, void as against his general creditors, and that voluntariness and contemplation of bankruptcy are merely circumstances to discover that intent.

When the conveyance is voluntary, that is, made with perfect free will, no doubt can be entertained of this being strong evidence of an intent to prefer. It, however, is not conclusive evidence; for the voluntary transfer may be valid.

The converse is also true. When the transfer is made from the fear of civil process, no doubt can be entertained of this being strong evidence of not being with intent to prefer in the event of an ensuing bankruptcy, but to avoid a bankruptcy by surmounting his difficulties. It is not, however, conclusive evidence; as the transfer by a trader of the whole of his property from fear will not protect the property from the body of creditors.

The law says, every man must intend the necessary consequences of his act; and the necessary consequences of such an action being the preference of one creditor to the exclusion of the general body of creditors, the law will not sanction it.

In the present case, it is clear that *Parry* acted, not from any hope to surmount his difficulties, but solely

from the hope to escape from his creditors, and escape the gallows.

The argument extended to a considerable length, but, it being, in substance, the same as before Lord *Lyndhurst*, is not repeated. (a)

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(a) The progress of the law upon this subject is as follows:—

1st, *Before the year 1727.*

Until the year 1727, a preference, which is now deemed a sort of commercial crime, was sanctioned as an honest act by a failing debtor to a friend.

1680, *Hunter's case*, *Freeman*, 270, seems to be the first case where an assignment, after an arrest, but before the completion of the act of bankruptcy, was declared fraudulent.

1721, *Cock v. Goodfellow*, 10 *Mod.* 489, the Lord Chancellor said, "It is objected, that this deed is made to give an undue preference to her children. I know not what law or reason there is to favour this objection. Any body may make his creditor executor, and then the law gives him a preference; and not only so, but the law allows this executor to give any other creditor, in equal degree, a preference. It is true, indeed, sometimes this Court will interpose, because these powers may be an inlet to fraud; but this Court will never take from the executor himself this preference which the law gives him. Is not paying a debt

giving that creditor as great a preference as giving security? And yet it was never pretended, that paying a debt should be held an act of bankruptcy, because lent two months before the bankruptcy. A man that knows he must be a bankrupt may by law pay off his creditors. And this power, at it may be abused, so, on the other hand, it may be very properly executed; there may be particular obligations in point of gratitude, &c."

1725, *Jacob v. Shepherd*, *Burr.* 478, the Master of the Rolls was so struck with the objection of fraud from preference, that he set aside the deeds, which deeds were afterwards, upon an issue, found valid.

1727, *Small v. Oudley*, 2 *P. Wms.* 427, a trader, in contemplation of his bankruptcy, and to give a preference to a favourite creditor, made an assignment to him of part of his property.

Master of the Rolls:—"There may be a just reason for a sinking trader to give a preference to one creditor before another; to one that has been a faithful friend, and for a just debt lent to him in extremity, when the rest

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I shall not call upon the other party to reply; for my opinion certainly is not in the smallest

of his debts might be due from him as a dealer in trade, wherein his creditors may have been gainers; whereas the other may not only be a just debt, but all that such creditor has in the world to subsist upon; in this case, I say, and so circumstanced, the trader honestly may, nay ought to give the preference. The same was done in *Cock v. Goodfellow*, and in Sir *Stephen Evans's* case. So that this having been settled, though it may have a mischievous consequence in preferring some creditors in hopes of payment from them afterwards, yet, according to these precedents, I must decree in favour of the deed giving a preference."

After the year 1728.

From the year 1728 a different opinion has been entertained, and the idea of its being in any case legal to make an assignment with intent to give a preference is not tolerated.

The test of preference seems, however, to have been, that the transfer was made on the eve and in contemplation of the immediate bankruptcy.

In *Unwin v. Oliver*, A.D. 1739, *Burr.* 481, Lord *Hardwicke* establishes the deed, because there was no suggestion that the imme-

diate prospect of a certain bankruptcy was the cause of the assignment.

In *Worsley v. Demattos*, 1758, 1 *Burr.* 467, Lord *Mansfield* says, "It has been argued, that, after a resolution taken by a trader to commit an act of bankruptcy, the trader, so resolving to become bankrupt, might lawfully prefer a just creditor, by conveying part of his effects to satisfy that creditor's debt.

"It is not necessary to determine that question in this cause, for here the question is of ALL: and therefore I will only say, that no such proposition is yet established, much less in the extent whereto it has been urged."

But if a bankrupt may, just before he orders himself to be denied, convey all to pay the debts of favourites, the worst and most dangerous priority would prevail, depending merely upon the unjust and corrupt partiality of the bankrupt.

In *Wilson v. Day*, A.D. 1739, 2 *Burr.* 827, a deed, with a view to give a preference, is declared to be an act of bankruptcy; and the same decision is to be found in all the subsequent cases.

In *Linton v. Bertlet*, A.D. 1770, 3 *Wils.* 47, a trader, in contemplation of bankruptcy, assigns

degree shaken by the very able arguments I have heard.

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one third part of his effects. *Per curiam*. The preference is a fraud upon all the laws concerning bankrupts, which proceed upon equality, and say that all creditors shall come in *pari passu*. There is no case wherever such a preference as this was allowed. The same spirit of equality ought to warm the courts of justice which warmed the legislature, when they made the bankrupt laws; and if we should let this deed stand, we should tear up the whole bankrupt laws by the roots: it is a bill of sale, made by a trader when he had an act of bankruptcy in contemplation.

In *Harman v. Fisher*, A.D. 1774, *Cowp.* 117, Lord Mansfield says, "The case of *Small v. Oudley* was a very favourable case; but I think it extremely shaken by the case of *Linton v. Bartlet*, which determines, that if the mere and sole motive of the trader was to give a preference, it shall be void. The opinion of the Court was founded, not upon one third being the same as an assignment of all his effects, but upon the trader's giving a preference, and upon his sole motive being to do so. If he can give it to one, he can give it to another, which would establish this principle; that a bankrupt may apportion his estate amongst his dif-

ferent creditors as he thinks proper.

In *Round v. Byde*, 1775, *Cooke*, 91, Lord Mansfield says, "I take it to be clear law, that if, in contemplation of bankruptcy, a man conveys to the fairest creditor that ever existed, it is not a fraudulent deed as between them, but it tends to defeat the whole bankrupt laws, and, as such, is held to be a fraud on the rest of the creditors. It is equally clear, that, though it be not a conveyance of the whole of his property, and that a part be omitted, yet, if it be made in contemplation of bankruptcy, it is a preference, and, as such, an act of bankruptcy.

The same doctrine is invariably held in all the following cases; and in *Hartshorn v. Slodden*, 1801, 2 *Bos. & Pull.* 582, Mr. Justice *Chambre* says, "The rule appears to me to be this: Any payment made by a trader before an act of bankruptcy, and in contemplation of such act, and with a view on his part to give a preference to a particular creditor, is void. This doctrine indeed is new, and has been introduced within our own memory, but affords a good rule when founded in equity."

The transfer being made on the eve of the bankruptcy, being

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I can by no means accede to the proposition, that the doctrine maintained by Sir *James Mansfield* in the Court

merely evidence of the intent with which it was made, it was soon discovered, that, by limiting the enquiry to this time, the object would be defeated. The rule has now been enlarged; and there has been but one question for consideration, viz. with what intent was the property transferred? If it is to prefer the creditor in the event of the debtor's bankruptcy, it is a preference, and void; if it is not to prefer the creditor, but, by satisfying the creditor, to surmount his difficulties, it is valid.

To discover this intent, it is of course necessary carefully to consider all the circumstances attendant upon the transaction.

There are certain general badges of fraud, or tests of honesty, which cannot escape notice.

If the grant or conveyance is made voluntarily, without any application by the grantee, fraud may be presumed. *Cock v. Goodfellow*, 10 *Mod.* 489; *Hartshorn v. Slodden*, 2 *Bos. & Pull.* 582; *Bell's Bankrupt Laws of Scotland*, 226; *Crosley v. Crouch*, 11 *East*, 261 and 262.

If the grant or conveyance is made without the privity of the creditor, fraud may be presumed. *Small v. Oudley*, 2 *P. Wms.* 427; *Harman v. Fisher*, *Cowp.* 117;

Alderson v. Temple, 4 *Burr.* 2235.

But the particular tests of fraud in cases of bankruptcy are:

1. The time when the transfer was made.
2. The solvency or insolvency of the debtor at the time of the transfer.
3. The transfer being made in consequence of a prior agreement.
4. The amount conveyed.
5. The transfer being voluntary or involuntary.

1. *The time when the transfer is made*; for if the transfer is made on the eve of bankruptcy, it raises a presumption of fraud; but it is only presumption, for if the real motive by which the trader is actuated is anxiety to stand his ground, the transfer may be valid, although only a moment before the bankruptcy. *Shaw v. Jakeman*, 4 *East*, 201; *Arboin v. Hanbury*, 1 *Holt*, 577; and *Reed v. Ayton*, 1 *Holt*, 504.

As a conveyance may be valid if made on the eve of the bankruptcy; so it may be void, notwithstanding a lapse of time, if clearly made with intent to prefer. *Law v. Skinner*, 2 *Blackst.* 996, is the case of a conveyance made *two years*, and *Hassel v. Simpson*, *Doug.* 88, *four years*, before open failure; both these

of Common Pleas, when this case was before him, is in the least degree consistent with the acknowledged law

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were assignments of the whole of a trader's property. This, however, does not seem to affect the position.

2. *The solvency or insolvency of the debtor at the time of the transfer* is another species of evidence to which attention is always paid, and upon which mistakes are frequently made; for the question is, not whether the creditor, from notice of his debtor's insolvency, obtained payment, but whether the debtor, from knowledge of his own insolvency, made the payment to prefer the creditor.

In *Cock v. Goodfellow*, A. D. 1721, 10 *Mod.* 489, Lord Mansfield, in commenting on the supposed reasons for establishing this deed, says, "She was solvent at the time." In *Cadogan v. Kennet*, *Cowp.* 435, Lord Mansfield says, "The circumstance of a man's being indebted at the time of his making a voluntary conveyance is an argument of fraud." *Hassel v. Simpson*, *Doug.* 88. The conveyance was declared an act of bankruptcy, although the trader was solvent at the time it was made. But note, this was a conveyance of the whole of his property.

3. *The transfer being made in consequence of a prior fair agreement* is always considered evi-

dence of the honesty of the transaction. *Small v. Oudley*, 2 *P. Wms.* 427. But query, whether this case is law. *Vide Harman v. Fisher*, *Cowp.* 117. *Vide Singleton v. Butler*, 1 *Bos. & Pull.* 283, which was a payment out of the usual course of a bill of exchange, and declared void.

4. *The amount conveyed is also important evidence* of the intent by which the debtor was actuated; for if a debtor convey the whole of his property to a creditor, or so much as will incapacitate him from trading, the law will infer, not that he intended to continue his trade, but that he intended the regular consequence of his act, "to discontinue it." "Such a deed," says Abbot, J., in *Pulling v. Tucker*, 4 *B. & A.* 385, "would make bankruptcy inevitable, and a man must be supposed to contemplate the consequence of his own act."

It is, therefore, the law, that a conveyance by a trader of the whole of his property for the satisfaction of a debt, or to indemnify a surety, is an act of bankruptcy. *Small v. Oudley*, 1727, 2 *P. Wms.* 427; *ex parte Foord*, 1755, 2 *Burr.* 477; *Worsley v. Demattos*, 1758, *Burr.* 467; *Wilson v. Day*, 1759, *Burr.* 827; *Compton v. Bedford*, 1762, 1 *Blackst.* 362; *Hooper v. Smith*, 1763, 1 *Blackst.*

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respecting preference by a bankrupt. It is contrary to what always was and is the law. It is quite contrary to

441; *Kettle v. Hammond*, 1767, *Cooke*, 86; *Alderson v. Temple*, 1768, 4 *Burr.* 2235; *Harman v. Fisher*, 1774, *Cowp.* 117; *Rust v. Cooper*, 1777, *Cowp.* 629; *Butcher v. Easto*, 1779, *Doug.* 282; *Devon v. Watts*, 1779, *Doug.* 86; *Hassell v. Simpson*, 1780, *Doug.* 88; *Inglis v. Grant*, 1794, 5 *Ter. Rep.* 530; *ex parte Scudamore*, 1796, 3 *Ves.* 85.

The principle of the rule seems to be this: A grant or conveyance by a trader of the whole of his property for the satisfaction of one or more of his creditors, to the exclusion of others, is an act which raises the strongest presumption that the trader is desperate; that whatever may be the immediate view of his speculations, if he were calmly to calculate the consequences of the action, he must know, that the necessary effect of such grant or conveyance must be the giving a preference to the grantee: the law, therefore, where the act must necessarily occasion a preference, will imply an intent to prefer.

This is a common principle in the law, that a man must intend the inevitable consequences of his actions. As if a trader depart the realm to avoid a criminal prosecution, or in defiance of such rules of morality as to manifest a neglect of the interest of

his creditors, he commits an act of bankruptcy. *Woodier's case*, B. N. P. 39; *Raikes v. Poreau*, *Cooke*, 73; *Vernon v. Hankey*, *Cooke*, 95. In *Foster v. Padget*, 7 *T. R.* 509, *Grose, J.*, says, "This construction of the act is not impeached by *Woodier's case*; for there the parties must have known that their creditors would necessarily be delayed by the steps they took. And *Lawrence, J.*, says, "I think that *Woodier's case*, and the case of *Raikes v. Poreau*, might have received the same determination, though on a different ground; for, though it was not the immediate object of the parties, in those cases, to delay their creditors by going abroad, yet as that must be the necessary consequence of such an act, it would be evidence of their intending to delay or defeat their creditors; and so it would come within the construction of the statute now contended for by the plaintiff.

In confirmation of this doctrine:—

Such conveyance is void, although the trader is under the influence of the fear of legal process at the time of making it. *Butcher v. Easto*, *Doug.* 282; *Newton v. Chantler*, 7 *East*, 158; *Thomson v. Hargreaves*, 7 *T. R.* 548.

what is now the admitted law, settled, not only by the decision of Lord *Ellenborough* in reviewing the case

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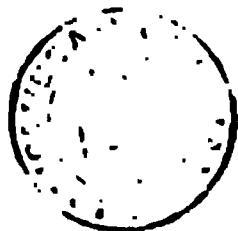
There is, however, a class of cases apparently in opposition to this doctrine, by which it seems to have been decided, that a conveyance of part of a trader's property, made upon the application of a creditor, is not invalid, because the trader knows, at the time of making it, that his failure is inevitable.

Rust v. Cooper, A. D. 1777, *Cowp.* 629, Lord *Mansfield* says, "Suppose a creditor presses his debtor for payment, and the debtor makes a mortgage of his goods, and delivers possession; that is, and at any time may be, a transaction in the common course of business, without the creditor's knowing there is any act of bankruptcy in contemplation, and therefore good: it is not to be affected by what passes in the mind of the bankrupt. In *Thomson v. Freeman*, A. D. 1786, 1 *T. R.* 155, the case states, that, at the time the deed was executed, the trader knew she was in an insolvent state. In *Cosser v. Gough*, A. D. 1789, 1 *T. R.* 156, Lord *Kenyon* said, that, in considering whether a payment were in order to give an undue preference, and in contemplation of bankruptcy, it was not sufficient to shew, which was the only evidence produced by the plaintiffs in this case, that the

bankrupt must have known that insolvency was inevitable, but the "*quo animo*" of both must be considered. In *Hartshorn v. Slodden*, A. D. 1801, 2 *Bos. & Pull.* 582, Lord *Alvanley* says, "Nor has it ever been held, that, if a creditor press for payment of his debt, and thereby obtain goods, that the intention of the bankrupt be called in aid to set aside the transfer. If the goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding." But in *Smith v. Payne*, A. D. 1795, 6 *T. R.* 152, Lord *Kenyon* seems to lay much stress upon the circumstance of the trader's not having any bankruptcy in contemplation at the time he complied with his creditor's application. But this doctrine seems to have been shaken in *Poland v. Glynn*, 4 *Bing.* 22. in note; in which case *Abbott*, C. J., says, "The object of the bankrupt laws being to divide the bankrupt's property equally amongst his creditors, if a tradesman found himself in such a situation that, in the judgment of any reasonable man, a bankruptcy is inevitable, no voluntary payment by him could be good, although it might be otherwise

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when it came into the Court of King's Bench, but settled by repeated decisions in other cases; so that no

if it were made under threat or pressure. The bankrupt avowed that he could not go on in September, and why should he think himself bound in honour to pay the defendants, unless he thought he could not pay others?"

Q. 1. Is not such grant or conveyance made by a trader, who knows his failure to be inevitable, an act which must necessarily give a preference; and will not the law, from such an act, imply an intent to prefer, even though fear may be the immediate motive of the action?

Q. 2. May not the state of a trader's mind, between the time of his insolvency and of his actually being a bankrupt, be divided into three periods?

1st, When he is insolvent, but thinks that by proper exertion he may extricate himself.

2dly, When he is in doubt.

3dly, When he is conscious of his inability to stand his ground.

And although the law will assist a trader during the first and second periods, yet when a trader is conscious of his inability to stand his ground, is it not just that he should abandon, or rather that he should consult, his own interest, by attending to the interest of the creditors at large; and ought the interest of the

creditors at large to be injured by acts originating in any of the fluctuating motives which may influence despair?

Assuming that the conveyance by a trader of the whole of his property, although from the fear of legal process, is an act of bankruptcy, it seems to follow, that, although the immediate motive may be fear, the act will be void, if the necessary consequence is preference.

5. *The transfer being voluntary or involuntary.* When the transfer is made voluntarily, without any application by the grantee, it is strong evidence of his intention to prefer.

That the making the assignment voluntarily is evidence of fraud is clear from all the cases; and that it is only presumptive evidence is equally clear from the same cases, and from considering that such a voluntary act may result from a most virtuous discharge of duty. *Coak v. Goodfellow*, 10 Mod. 489, is the case of a voluntary assignment, where the trader was solvent at the time it was made. In *Hartshorn v. Slodden*, 2 Bos. & Pull. 582, Lord Alvanley says, "It is not sufficient to avoid the delivery of goods by a trader, that such delivery be made voluntarily on his part, and that an act of

proposition is more clear, more undoubted, than that, in order to make a payment or a delivery of goods by the bankrupt to the creditor void as against the assignees, it must be a voluntary payment in contemplation of bankruptcy. Both these circumstances must concur to constitute the invalidity of the transaction.

The whole proceeds upon the ground of its being a fraudulent preference; a fraud committed in favour of one creditor at the expense of the body of creditors,

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bankruptcy ensues; it must also appear that he had an act of bankruptcy in contemplation at the time of the delivery. See *Bell's Bankrupt Laws of Scotland*, 226. See *Crosby v. Crouch*, 11 *East*, 261 and 262.

Every circumstance, therefore, with respect even to a voluntary transfer, must be minutely examined. They are either,

1st, With the knowledge of the grantee; or,

2dly, Without the knowledge.

Small v. Oudley, 2 *P. Wms.* 427, is a case of a valid conveyance without the privity of the grantee; but as to doubts respecting the law of this case, *vide Harman v. Fisher*, *Cowp.* 117. *Alderson v. Temple*, 4 *Burr.* 2235, is a void transfer, made on the eve of bankruptcy, without any acceptance by the creditor before the bankruptcy. *Harman v. Fisher*, *Cowp.* 117, *S. P.*; *Singleton v. Butler*, 2 *Bos. & Pull.* 283.

When the transfer is made from the fear of legal process, and under such circumstances as

to manifest the debtor's intention, by making the transfer, to stand his ground, it is valid.

A grant or conveyance, made by a debtor from the fear of a suit, is not valid, if it is of the whole of his property. *Butcher v. Easto*, *Doug.* 295; *Thornton v. Hargreaves*, 7 *East*, 545; *Newton v. Chantler*, 7 *East*, 138.

A transfer by a trader of such part of his property, as when actually transferred will not incapacitate him from trading is valid, if made from the fear that process by action will be commenced to enforce payment of the debt.

A grant by a trader of part of his property, executed in consequence of the pressure of a creditor, and from fear that hostile measures will be adopted, is void, if it contain provisions in favour of some relation of the debtor, which are voluntary, and to give them a preference. *Morgan v. Horseman*, 3 *Taunt.* 244; *Pulling v. Tucker*, 4 *B. & A.* 386.

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contrary to the policy of the bankrupt law, which looks to, as its principal object, an equal distribution of the bankrupt's estate.

It was at one time supposed that the pressure necessary to defeat the payment made in contemplation of bankruptcy must have been by legal process, or by threat of legal process.

That has been long since abandoned. It is not now pretended that any thing of the kind is in the least degree necessary. The question in this, as in every case, is this, "Was there or was there not pressure?" For they are all cases in contemplation of bankruptcy. Generally, almost always, it is in such cases that the preference is said to be given.

Then the question always is, Did the thing move from the bankrupt or from the creditor? And you will find, (I forget the names of the cases; there are many of them; but you will find) in "*Crosby and Crouch*," "*Smith and Payne*," "*Thomson and Freeman*," and so on,—the last was certainly under an arrest, but in the two first there was merely a request,—nay, a request, in *Smith and Payne*, of a most friendly nature; for it was of a creditor who had the week before gone out and lent the party a sum, I think of 8,000*l.*; and it was merely a request on his part to this effect: "I will thank you to give me a preference;" a request of the most friendly nature. Now I have said so much in order to remove what is supposed to be the great authority of Sir *James Mansfield* respecting the pressure.

Now then I am called upon to grant a new trial in very peculiar circumstances; and though I am bound to say this Court is not bound in granting new trials by the common law rule, yet to a certain degree it is; for if the thing has been wholly tried, if the whole case has been before the jury, unless there is something emerging,

if I may say so, from the trial, or from the case which now comes before the Court, and which causes the Court to think it is likely to have its conscience enlightened from a new trial, the Court will stand on the result of the old trial.

Is there, then, any thing more clearly against it than that in the first case there has been a noncalling of witnesses who might have been called? It is not pretended that the knowledge of these witnesses had not come to the party before the trial, nor is it shewn how these parties should speak if they were now to be examined to the fact; it is only said, if *Williams* was called and examined, if *Gilpin Gorst* were more examined, and if *Mr. Mardell* was more thoroughly examined, the case might stand differently. Why was not *Williams* examined, and why were not the others more thoroughly examined? If it is said that *Mr. De Tastet* might have called *Williams*, he being his clerk, and that the other side, expecting he would do so, did not examine him, why am I not informed of what *Williams* will swear to? For I never heard of any application made, even in this Court, for a new trial, (and there has been more than one unfortunately even in this very case,) not only in which it was not said a party might give evidence, but what evidence he was to give, and how that evidence had not been got before. Is it to be said that the Court is to send you now, merely on its being asked for, on a wild chase, on a roving commission, because, perhaps, a party may give evidence that will affect a cause? No; that is not the way in which the Court is to vex and to harass parties with litigation. You must shew what the party is likely to swear to, and why he was not examined before; and that is generally done by an affidavit of the party himself; or, if he refuses to make such affidavit, (for it is

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voluntary on his part,) then an affidavit from the one who has ascertained and who believes the fact; and with this additional circumstance in that affidavit, that the other party refuses to make or to join in an affidavit. Now these are the rules, the wholesome rules the courts of law dwell upon; and decidedly they ought to guide this Court, as well as any other courts, in granting new trials.

The next observation is of great importance; it is this:—Is it likely that the result of the new trial, if one is granted, will be different from that of the old trial? for if it is not, there is clearly a ground why a new trial ought not to be granted, either by this or any other court. Now, when I come to look attentively to the whole of the evidence in this case that has been fully and ably commented on, I must say, it strikes me that the verdict is not likely to be altered by a new trial.

Parry was charged with a forgery; Mr. *De Tastet*, on hearing of that charge, made an exclamation, which I will admit to have been an agitated one, as a poor man would naturally do under such circumstances: “Good God! what has become of my property?” Then without any further threat, or any further pressure,—any further threat of pressure; for to talk of compounding felony does not appear to me to be a warranted use of the expression.

Then that being so, what does the question resolve itself into but this? Did Mr. *De Tastet* do more than what would have been done or said by any party in his situation where there was no misdemeanor? The question is: Voluntary or not voluntary; pressure or no pressure? That is the question,—to get rid of the hand which attaches to the preference.

Now I agree, that if a party commits a misdemeanor, or does any thing contrary to the law, for the purpose

of securing to himself a preference, that would be a ground for saying he should not take the benefit of that act—of, in short, the crime. But that case does not arise here. The party here did not do that. He made an exclamation, an exclamation upon which I defy any jury to convict him of compounding felony; it was a natural expression of his own alarm at seeing the bill was forged, which he had received as his only security for the large sum of 22,500*l*. I, therefore, do not consider, in any view in which this may be taken, and throwing entirely out of my view the point that has been stated to be rather a novel and a subtle one, I mean the mixed motives,—I do not consider that in this case any different result could be expected from a new trial than that which we have had.

And then we come, last of all, to consider what I cannot lay out of view, namely, the length of time that has taken place. Length of time is not only much, but every thing, in coming for a new trial. Why do you allow five or six years to pass away before you come and ask for a new trial? because there must be an end to a thing of this sort some time or other. My Lord *Eldon* appears to have felt that; but it appears also that he was much pressed by the law which my Lord *Ellenborough* appeared to have laid down, and which Mr. Justice *Bayley* appeared to have laid down, both undoubtedly great judges. Lord *Eldon* seems to have thought it right that there should be an end put to it: *ut tandem sit finis litium*: and *tandem* was never more accurately employed than it may be employed in the present case; for it is now, after a great lapse of years, we are called upon to put an end to it. Now, upon this coming on again after the trial, it did not come on for the purpose of having a new trial, but solely for the purpose of raising the question of costs, which had not been sufficiently decided in their favor,

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they thought. It was brought on for the purpose of having the difference between the costs given as between party and party, and the costs allowed as between solicitor and client; that was the only ground up to this eleventh hour; and to this more than the eleventh hour, I am sorry to say, the only ground the party ever thought there was for coming to this Court.

Taking the whole together, I feel no doubt whatever upon the question. I am satisfied that the prayer of the petition must be granted.

The opinions of Sir *James Mansfield* and of Lord *Eldon* were consequently overruled; and the sum ordered to be paid to Mr. *De Tastet* amounts to about 100,000*l.*

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Ex parte CUMMING.

V. C.
March 23,
1829.

Petition of person in Ireland must be signed by the petitioner.

THE petitioner was in Ireland, and the petition was signed by the agent.

Mr. *Knight* objected that he was not absent from the kingdom so as to warrant a signature by the agent.

Mr. *Montagu* said, that he was absent from the kingdom, as the order considered Ireland as separate from England, by not having used the words “United (a) Kingdom;” and of this opinion was the VICE-CHANCELLOR, who ruled that the signature was not sufficient.

(a) The order is as follows : of which cases the signature of “August 12, 1809. It is ordered, one of the partners is to be that all petitions in bankruptcy deemed sufficient, and in the latter case the petition is to be presented for hearing shall, before they are presented, be respectively signed by the petitioners, except in cases of partnership or absence from the kingdom, in the former signed by the person presenting the same on behalf of the person so abroad.”

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Ex parte GALPIN. — In the matter of COLES and GALPIN.

V. C.
Dec. 2,
1830.

THIS was a petition by the bankrupt for a renewed commission, that he might surrender for the purpose of petitioning to supersede.

A renewed commission may issue for the bankrupt to surrender previous to superseding.

Mr. *Macarthur*, for the petition, said, that in *Twogood* and *Hankey*, *Buck.* 65, Lord *Eldon* had stated, that “there could not be a renewed commission, all the creditors having been paid the full amount of their debts;” and, in the present case, he was bound to admit that all the creditors had been satisfied.

1 Dec 2 1830
2 — 96.
3 — 192.

Mr. *Rose*, for the assignees, insisted that a renewed commission was necessary when any thing remained to be effected under the commission; and that, as there were not creditors to consent to the supersedeas, the bankrupt must surrender.

The VICE-CHANCELLOR: — I cannot supersede on the application of the bankrupt previous to his surrender, for which purpose there must be a renewed commission; and, to remove all doubt, let it be ordered, on the petition of the assignees, who, as I understand, consent upon being indemnified.

L. C.
Aug. 2,
1830.

If the assignees neglect to have a solicitor's bill of costs taxed by the commissioners, the bankrupt may, after having settled with the creditors, apply to the general jurisdiction of the Court, and obtain an order to tax the bill.

Feb. 2,
1830.

Ex parte BAYLEY. — In the matter of BROOM.

BAYLEY sued out a commission against *Broom* in 1823, under which *Bayley* was solicitor. *Bayley* received the full amount of his debt out of the sale of a mortgage. The bankrupt settled with all his creditors by composition, except the assignees, to whom he applied for the surplus which would remain after paying themselves 20s. in the pound on their own debt. *Bayley* demanded payment of his bill of costs of 121*l.* 9*s.* 7*d.* up to the choice of assignees, and of 380*l.* after the choice.

A petition was presented by *Broom* for a taxation of *Bayley's* bills by the Master, without any previous taxation by the commissioners of the bill of 380*l.*; which was ordered by the Vice-Chancellor.

From his Honour's decision this appeal was presented.

Mr. *Horne* and Mr. *Jacob* for the appellant: — One of the bills was taxed by the commissioners some years since: the other bill, which was not made out until November last, has not been taxed by the commissioners; and this petition prays, that a course contrary to the direction of the statute may be adopted. (a) But even if the directions of the statute are not imperative, specific errors, which are not stated to either of the bills, ought to have been stated.

Mr. *Rose contra*: — The assignees having failed to do their duty, the bankrupt has a right to come to the general jurisdiction, in order to have these bills taxed. He settled with all his creditors except his assignees, and

(a) See statute in note, *ante*, 134.

justly complains that the costs of the solicitor, up to the choice of assignees, amount to no less than 126*l.*, when the ordinary costs in London would be not more than 40*l.* or 50*l.*; and that the subsequent bill amounts to 300*l.*

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The 14th section applies to creditors, and does not exclude the general jurisdiction (a) of the Court to allow the bankrupt to have the bills taxed before a Master.

The Lord CHANCELLOR reversed the order of the Vice-Chancellor, so far as it directs a taxation by the Master instead of before the commissioners; the assignees undertaking to tax the bill before the commissioners, and to intimate to the commissioners that the bankrupt should have leave to attend.

Ex parte PELHAM. — In the matter of PELHAM.

V. C.
LINC. INN,
Feb. 10,
1831.

A PETITION had been presented by *Coombe*, a creditor, to supersede the commission. To this petition *Pelham* was the respondent. This petition by *Pelham* stated, that a petition was presented by *Coombe*; that an affidavit, sworn by *Free*, was filed in opposition; that, in reply to *Free*'s affidavit, an affidavit, sworn by *Hamber*, was filed by the petitioner, which contained scandalous and impertinent matter; that is to say, that *Free* was, from 1819 to 1823, clerk to the deponent, during which time he received various sums of money on account of deponent, without deponent's knowledge or consent,

A petition to refer an affidavit for impertinence must be presented before the original petition is heard.

The person scandalized must petition.

Dea c & C 529
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Mont & Bli

(a) *Ex parte* Barlow, ante 88.

Dea c & C 218

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consent, which he appropriated to his own use, and never paid to the deponent, but shortly afterwards took the benefit of the insolvent debtors' act; that, for the last two or three years, he had occasionally seen *Free* wandering about the bankrupt court, attending bankrupts upon their examinations, and soliciting others to employ him to prepare their balance sheet; that he believes *Free* to be a person of bad character, and in exceedingly low circumstances, and that the deponent would not believe him on his oath.

Mr. *Montagu*, for the petitioner, applied, during the hearing of the original petition, for the usual *ex parte* order to refer, which his Honour the Vice-Chancellor made; but the reference was not prosecuted, as it was arranged that it should be argued before the Court.

Mr. *Knight* and Mr. *Jacob*, for the respondent, stated, that this application was too late, as the original petition was in the course of hearing before this petition was presented; and if, after the hearing, any part of the evidence was struck out, the Court, in case of an appeal, would hear the petition on different evidence. It was also contended that *Pelham* was not the party to complain, as the affidavit was not scandalous as to him.

Mr. *Montagu*, in reply:—The affidavit is clearly scandalous and impertinent, and the application is properly made by *Pelham*. In *ex parte Simpson*, 15 *Vesey*, 476, which was an application to take an affidavit off the file as scandalous, Lord *Eldon*, speaking of the principle, says, “that he did not think any application by any person was necessary, and that the Court ought to take care that, either in a suit or in this proceeding, allegations bearing cruelly upon the moral character of

individuals, and not relevant to the subject, shall not be put upon the record."

With respect to the application being too late, the Court might, when this petition was mentioned, have directed the original petition, if necessary, to have stood over until the Master had made his report; and in *ex parte Gates* in *re Elgie* a similar application to refer an affidavit was made on the day the original petition was in the paper, and the order was made, and the Master's report, that the affidavit was scandalous and impertinent, was confirmed.

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The VICE-CHANCELLOR:— This affidavit of *Hamber* certainly appears to me to be scandalous. On the case brought before the Court on the original petition, it was not necessary to state any thing about *Free*. It was, indeed, attempted to be shewn, that he would not have been employed unless there had been something underhand. As far as *Free* was concerned the affidavit was scandalous; and also impertinent as to *Pelham*. But then no application is made by *Free*; and it appears to me, that the person scandalized is the person to make the application. The only person applying is the respondent *Pelham*. It was his duty to have presented his petition before the cause came on for hearing.

Petition dismissed.

1 Dec 64 388.

L. C.
March 12,
1831.

If a creditor through accident omits to prove at the final dividend, he may be permitted to prove, without disturbing any payment made by the assignees, and placing the creditors not paid in the same situation as if he had originally proved.

*7 Dec 64 537
In on 1 Dec 64
Bel 66*

Ex parte DAY and COOPER. — In the matter of FENTON.

MAY and *Morritt* presented a petition, stating that they were creditors for 1,937*l.* 12*s.*; that on the 10th of November a first and final dividend was declared; that they intended to have proved at the meeting for declaring the dividend; that *May* had been ill, and left the management of the business to *Morritt*; that *Morritt*, by mistake, supposed that the 20th, instead of the 10th, of November was appointed for the dividend meeting; that *Morritt* did not discover his mistake until the 20th, on which day he informed the solicitor under the commission; that on the 21st *May* gave notice to the assignees and the solicitor not to part with any cheques for the dividends; that, at the time of notice, *Cooper* and *Peto* were the only creditors who had been paid their dividend; that *Peto* consented that the dividend should be opened. The petition prayed, that the order of dividend might be rescinded, and a new meeting for dividend appointed, at the expence of *May* and *Morritt*; that they might prove their debt, and that the commissioners might re-calculate the dividends. This petition was, on the 15th of February 1830, heard by the Vice-Chancellor, who made the order as prayed. From the order of the Vice-Chancellor the assignees and *Cooper* presented this appeal.

Mr. *Knight* and Mr. *Wigram* for the appellants:—

As an order of dividend gives a vested right, *ex parte Grant*, 1 *Mont. & Mac.* 80, and many of the creditors have not been served, the Court will not make any order by which the absent creditors can be prejudiced; and they will be prejudiced by this order, as the amount of their dividend will be diminished.

But should the Court be disposed to interfere, without the service upon all the creditors whose rights may be affected, yet the Court will not, for the laches of the petitioners, compel a creditor, who has been paid, to refund; which is the effect of the order made by the Vice-Chancellor.

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Mr. *Horne* and Mr. *Montagu* for the respondents:—

With respect to the creditors who have not been paid, the assignees will protect their interests; and the expence of serving every creditor would be improper. Only one creditor was paid before notice of the mistake; and as this was a first and final dividend, and a mistake has occurred, the creditor has a right to have it rectified, upon immediate notice, and at his own expence. The only other creditor who had received the dividend consented to return the excess which he had received, and *Cooper* is the only creditor who refuses. The dividend should, therefore, be opened, on paying all expences.

The LORD CHANCELLOR:—

I think it would be too strong to make those who received before notice refund; and those creditors who have not been paid must be put in the same situation as they would have been in if *May* and *Morritt* had originally proved. The creditors paid before the 1st of December must retain the amount they have received; and the costs of the appeal to be paid out of the estate, *May* and *Morritt* making good to the creditors the difference.

After the hearing, it was discovered that there were not three commissioners present when the order of dividend was made; upon which it was ordered that the order for the dividend should be rescinded, and that *Morritt* and *May* should prove, and a new meeting for declaring a dividend held.

If three commissioners are not present when an order of dividend is made, it is invalid.

V. C.
LINC. INN,
March 27,
1830.

If a true bill for perjury is found against the solicitor to a commission, who made an affidavit in opposition to a petition to supersede, and it is necessary to produce the commission and proceedings, and the original affidavit, at the trial; the Court will order the solicitor to deposit them in the secretary's office, and to be produced.

Ex parte TIPTON. — In the matter of HARRIS.

THE petition stated, that, in opposition to a petition presented by the petitioner to supersede the commission; an affidavit was filed, sworn by *Smallridge*, the solicitor under the commission; that an indictment for perjury was preferred by the petitioner against *Smallridge*, in respect of the allegations contained in such affidavit, and a true bill found; that it was necessary to produce in evidence on the trial the commission and proceedings, which had not yet been entered of record, and were still in the possession of *Smallridge*, as solicitor, together with the two original affidavits of *Smallridge* and the petitioner, which were also required in evidence; and praying for an order to enrol the commission and proceedings, and lodge them at the bankrupt office within a week, and that some proper person should attend with them and the original affidavits at the assizes.

Mr. *Knight* for the petitioner.

Mr. *Horne* and Mr. *Wakefield*, *contra*: —

The application is not of course. *Ex parte Warren*, 1 *Rose*, 276. The petitioner is not interested in the petition. It is a question whether such a party can apply and have the commission enrolled.

The VICE-CHANCELLOR: —

The commission is the commission of the great seal, and the Court will so deal with it as may best effectuate the purposes of justice. The question, therefore, is, Whether the purposes of justice require this enrolment, and the production of these documents?

Now it appears to me, that this jurisdiction would grievously miscarry, if the Court were not in such a

case as this to assist in forwarding the course of justice, in a case where there is an indictment of such importance, and where a true bill has been found for perjury. For this reason, which it is a satisfaction to me to see confirmed by the principle of the decision in *ex parte Warren*, I am of opinion that the order must be made.

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Ex parte DICAS.—In the matter of NOKES.

L. C.
May 7,
1831.

ON the 22d of February, *Dicas* was served with the usual four day order, on the petition of the assignees of *Nokes*, for payment of 56*l*. No demand of the sum was made, either at or after the service of the order. On the 12th of March an order of commitment was obtained, upon affidavit of service of the four day order, and of non-compliance with its conditions. *Dicas* was arrested on a warrant obtained under this order.

If the usual four day order to pay money or stand committed is served, but no demand made, and the party is committed, the Court will discharge the commitment, with costs.

This was an application by *Dicas* to be discharged, upon the ground of there not having been a demand of payment.

The LORD CHANCELLOR, having conferred with the register as to the practice of the court, and referred to *Wilkins v. Stephens*, 19 *Ves.* 117, ordered that his former order of the 12th of March for the commitment of *Dicas* to the Fleet, should be discharged, with costs.

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If a commission is renewed to a distant place from where the majority of the creditors reside, and the original commission was worked, the Court will, for the convenience of the creditors, renew it back to the original place.

Ex parte WARING.—In the matter of TURTON.

IN 1788 a commission had issued against *Turton*. The commissioners, assignees, and bankrupt had long since died; but it having been recently discovered that there was property in the neighbourhood of Birmingham to which the creditors in his right were entitled, the representative of a deceased assignee took out a renewed commission, directed to commissioners at Birmingham. The original commission had been executed at Bristol. It did not appear whether that assignee, whose representative so took out the renewed commission, was or not the *surviving* assignee; but he certainly was *not* a creditor.

This was a petition by a Bristol creditor to supersede the Birmingham commission, and to have a renewed commission, directed to Bristol, at the cost of the respondent.

It was suggested at the hearing; 1st, That the deceased assignee not having been a creditor, no commission could be taken out by his representative: 2d, That a renewed commission ought properly to go to the former place of execution: 3d, That the convenience of the creditors required it should go to Bristol, as the majority of them resided in and about that city.

On the other side it was submitted, that any person interested might take out a renewed commission, whether creditor or not. In *ex parte Galpin (a)*, the Vice-Chancellor had ordered a renewed commission, on the petition of the bankrupt, in order to give him an opportunity of surrendering. That, unless in London, a creditor taking out a commission had, by the practice of

(a) *Ante*, 207.

the Court, the right of directing where it should go: it need not go to its former place of execution, if there was a reason for taking it elsewhere. Here the property was at Birmingham. The investigations must be conducted, and witnesses examined, there; and as to the convenience of the creditors, as they had already proved, it was immaterial to *them* where it was carried on. At all events, the petition was wrong in praying for the supersedeas with costs, as, if the Court thought it right to change the destination of the commission, the respondent must have his costs.

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The VICE-CHANCELLOR decided, that it was not necessary that a person should be a creditor to take out a renewed commission; nor was it necessary that it should be directed to a place where it had before been executed; that rested in the discretion of the party taking it out (except in London), subject to the controul of the Court: that the property being at Birmingham, and the convenience of making enquiries in that neighbourhood, was a fair reason for the assignee taking it there in the first instance; but now that the attention of the Court was called to the question where it could be most properly executed, his Honor thought the convenience of the creditors must decide it. By the proceedings it appeared that forty-five creditors had proved; of these thirty-four, amounting to 36,000*l.*, resided at Bristol, four others lived in London, and two in Gloucester, amounting to 3,000*l.* Putting the creditors all together, in Staffordshire and Shropshire, they did not amount to 3,000*l.*; under the very great preponderance, therefore, of number and value, his Honor thought that the commission could, with more propriety, and with greater benefit to the creditors, be executed at Bristol, than at Birmingham; but the respondent, who had

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taken out the Birmingham commission, must be paid the costs he had been put to, and those of the application. The petitioner also to take those costs, and also his own, out of the estate. (a)

Mr. *Knight* and Mr. *Cooper* in support of the petition.

Mr. *Rose* and Mr. *Jacob* for the respondents.

894.26.567.

Ex parte MORRIS.—In the matter of DESOR-
 MEAUX.

V. C.
 May 30,
 1831.

An insolvent who has applied to take the benefit of the act is not insolvent within the rule that a proof cannot be made against the separate estate, if there is a solvent partner.

Section 62 applies only to partnership subsisting at the time of the bankruptcy.

THOMAS DUNSTON purchased an annuity, for which he paid 1,960*l.* The grantors were,

1. *J. Fraser*, who had become bankrupt;
2. *J. Dunston*, who had become bankrupt;
3. *J. Burnet*, who was abroad;
4. *J. Dyer*, who had applied to take the benefit of the insolvent act;
5. *Desormeaux*, the present bankrupt.

When *Dyer* applied to take the benefit of the insolvent act, he had stated in his schedule that his debts amounted to 1,600*l.*, and that he had not any assets. Upon notice having been given to *Dyer*, that his discharge under the insolvent act would be opposed by an adverse creditor, he paid the debt of the detaining creditor, and was liberated.

John Dunston had, before his bankruptcy, given a bond of indemnity to *Desormeaux*, against any payments under this annuity. *Thomas Dunston* died, and appointed *John Dunston* his executor. *John Dunston* was admitted by the commissioners to prove as executor for

(a) Would it not, in these cases, save expense and trouble, to renew the existing commission, instead of superseding it?

Dec 27/30.

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1,950*l.*, the purchase money of the annuity, which annuity was, from a defect in the memorial, void, and had elected an assignee by virtue of such proof.

The application to prove was made, *first*, under section 62 (a); and, *secondly*, upon the general ground that proof might be made against the separate estate, as there was neither joint estate nor a solvent partner.

This was a petition to expunge the proof, and vacate the choice of assignees.

Mr. *Knight* and Mr. *Jacob* for the petition : —

Section 62 does not apply to partnerships which were dissolved before the bankruptcy, and in this case there was both joint estate and a solvent partner. There was joint estate, because the creditor, before he was admitted to prove, abandoned certain patents which he held as security, upon the supposition that they were not worth any thing, but in reality they would, if offered for sale, be productive; and if they produced a farthing, it was joint property, within the meaning of the rule. In *ex parte Clay*, 1808, 1 *Montagu & Gregg's Bankrupt Laws*, 223, Lord *Eldon* said, “ If there be only sixpence of the joint estate, joint creditors are not entitled to a divi-

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(a) Section 62. — “ And be it enacted, that in all commissions against one or more of the partners of a firm, any creditor to whom the bankrupt or bankrupts is or are indebted, jointly with the other partner or partners of the said firm, or any of them, shall be entitled to prove his debt under such commission for the purpose only of voting in the choice of assignees under such commission, and of assenting to or dissenting from the certificate of such bankrupt or bankrupts, or of either of such purposes; but such creditor shall not receive any dividend out of the separate estate of the bankrupt or bankrupts until all the separate creditors shall have received the full amount of their respective debts, unless such creditor shall be a petitioning creditor in a commission against one member of a firm.”

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dend *pari passu* with separate creditors. The only joint estate was a bad debt of 9*l.*, which, being put up to auction, could not be sold.”—In *ex parte Peake*, 2 *Rose*, 54, it was stated, and without contradiction, that the joint effects were in value only about 1*l.* 11*s.* 6*d.* In this case it was said by the Lord Chancellor:—If in point of fact there is joint property, whether to the amount of five pounds or five shillings, it is an answer to this application; convenience requires that the established practice of the Court should be understood and adhered to. If the property alleged to exist in this instance be of such a nature, and in such a situation, that any attempt to bring it within the reach of the joint creditors must be deemed a desperate, or, in point of expense, an unwarrantable attempt, that would authorize a departure from the rule: in truth there would then be no joint property.—And in an anonymous case, (in a note to *ex parte Peake*,) in the matter of *Lee and Armstrong*, joint property clearly established to the amount of 5*l.* was ruled to be a complete bar to the application.

But there was not only joint property, but a solvent partner, within the meaning of the rule; as, according to *ex parte Janson, Buck*, 229, insolvency is not sufficient, unless there is a judicial declaration of insolvency, which in the present case there was not, as *Desormeaux* had withdrawn his application to the insolvent court, and had paid the detaining creditor, and would, in all probability, have paid the present creditor, if application had been made to him for payment.

Mr. *Rose* and Mr. *Montagu* for the assignees:—

That section 62 applied to all cases where a debt was contracted by a partnership is obvious, not only from the words of the statute, but from the obvious intention of the legislature; the words are clear, and if they did not

apply to partnerships dissolved before the bankruptcy, the clause would, in ninety-nine cases out of a hundred, be inoperative.

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With respect to there being joint estate, the petitioner was entitled to an enquiry, if he thought proper to ask it, which he did not. With respect to there being a solvent partner, the question was, Whether *solvent* meant *insolvent*; as *Dyer* had applied to take the benefit of the insolvent act, and in his schedule had stated that he owed 18,000*l.*, and that he had not a farthing of assets to be applied in payment.

There certainly was a rule, that a joint creditor could not prove if there was a solvent partner, but the principle of this rule would shew that it never was intended to apply to a case like the present. The rule itself was disapproved by Lord *Thurlow*, who thought that a joint creditor ought not to be deprived of his right to enforce judgment under a statutable execution, in the same mode as he would have been entitled under a common law execution, by proceeding against both the joint and separate estate of the debtor. *Ex parte Cobham*, 1784, 1 *Bro.* 576; *ex parte Heyden*, 1785, *Cooke*, 254; *ex parte Hodgson*, 1785, 2 *Bro.* 5; *ex parte Page*, 1786, 2 *Bro.* 119; *ex parte Flintum*, 1786, 2 *Bro.* 120; *ex parte Copland*, *Cooke*, 286. The rule, as it now stands, was established by Lord *Loughborough*, in *ex parte Elton*, 1796, 3 *Vesey*, 238, in which it was decided, that joint creditors should not be admitted to receive a dividend with the separate creditors, until an account was taken of what they might have received from the joint estate; and he ordered the dividend to be reserved until such account was taken. The principles of this decision, as stated in the case, are, *first*, a court will not allow him to attach himself upon one fund, to the prejudice of those who have no other; *secondly*, if it be said that the

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separate creditors have a remedy against the joint estate, the answer is, that the creditor's remedy is easy and expeditious; the remedy of the assignees difficult and remote; and a great object of the bankrupt laws is to make a speedy distribution of the property, and to avoid litigation. In *ex parte Abel*, 1799, 4 *Vesey*, 837, Lord *Loughborough* confirmed the doctrine in *ex parte Elton*, but, upon the proposal of the assignees, ordered that the separate estate should pay a dividend upon one eighth of the debt, there being seven persons in partnership; and the assignees were ordered to retain sufficient to answer this creditor, when it was ascertained what ought to be paid to him out of the estate.

Upon the justice of this rule, as it is a rule, there can be no necessity on this occasion to enquire; but assuming it to be just that a creditor should be restrained from enforcing payment of his debt, either because there is another fund to which he may resort, or because it may be convenient for the general body of creditors, it ought at least to be clear that there is another fund, and that the creditor cannot be injured. The injury, to a certain extent, may be prevented, by the entry of a claim upon the proceedings; but what justice can there be in exposing a creditor to the chance of being barred by the certificate, and of compelling him to incur the expense and to be exposed to the delay of litigation with an insolvent debtor? Lord *Eldon*, therefore, constantly expressed his disapprobation of the rule as established by Lord *Rosslyn* in *ex parte Elton*. In *ex parte Pinkerton*, April 1801, 6 *Vesey jun.* 814, the prayer of the petition was to prove, under a separate commission, the sum of 223*l.* 18*s.* 6*d.*, upon a bill of exchange drawn by two persons, one of whom was solvent, but abroad, and not likely to return, and the other was the bankrupt. They were connected only in this transaction. There was no joint property. Lord

Eldon said, whatever he thought of a settled rule he should adhere to it, on account of the mischief arising from shaking settled rules, but observed, that it seemed very singular that the nature of the debt should turn upon the fact, whether there is joint property or not. His Lordship made the order, that the petitioner should be admitted to prove his debt, reciting that it was admitted that there was no joint property. *Ex parte Nuttal*, June 1801, 6 *Vesey* jun. 814. Lord *Eldon* also followed the cases before Lord *Loughborough*, observing, that he did so that the rule should not change with every new judge, rather than from any other motive. *Ex parte Clay*, 1802, 6 *Vesey*, 813, petition by joint creditors, praying that they might be admitted to prove, and receive dividends, under a separate commission. Lord *Eldon* said, “The rule that prevailed in Lord *Hardwicke*’s time, and down to the time of Lord *Thurlow*, was, that joint creditors should not be admitted to prove under a separate commission, for the purpose of receiving dividends with the separate creditors. Lord *Thurlow* altered it, upon much consideration, thinking the joint creditors ought to be admitted with the separate creditors, and left it so when he left this court. Lord *Loughborough* thought that was not right, and got back again, not quite to the old rule, but he settled it that they should prove only for the purpose of keeping separate accounts, but not to receive a dividend. I do not presume to say which is the best rule, except that the last is open to this difficulty, that the creditor is not a party to the proceedings under the commission.”

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This rule, thus always disapproved by Lord *Eldon*, does not apply where the creditor is abroad, *ex parte Pinkerton*, 6 *Vesey*, 814, and *ex parte Kensington*, 14 *Vesey*, 447; nor does it apply where the co-debtor

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is a bankrupt, because in the one case, that is, when the co-debtor is abroad, it is unreasonable to expose the creditor to the expense and delay of legal proceedings; and, when the co-debtor is insolvent, it is more unreasonable to compel the creditor to incur the certain costs attendant upon proceedings at law, without the possibility of repayment by judgment against an insolvent. And although, in *ex parte Janson*, Buck. 229, it was decided, that the rule did not apply when the co-debtor was insolvent, but a commission of bankruptcy had not issued against him, yet the reason upon which the judgment in that case is founded has always been doubted. And in a subsequent case, in which Mr. Agar and Mr. Rose were counsel, Lord Eldon refused to act upon it, as he said that he could not think it just to compel a creditor, by suing a beggar, to incur the certain costs of an action for the contingency of a dividend which might be much less than the costs of the suit. But the authority of *ex parte Janson* does not apply to the present case. The words of the Vice-Chancellor are as follow: "I have conversed with the Lord Chancellor, and we agree in thinking, that so long as there is another fund to which the joint creditors can resort, they cannot receive a dividend with the separate creditors, and that in the present case the inability of the debtor to pay all his debts does not take it out of the general rule, because it does not follow that a diligent creditor may not get the whole of his debt paid." But in the present case there is no fund to which the creditor can resort, as *Dyer* has stated in his schedule that he has not a farthing to pay debts to the amount of 15,000*l*.

June 23,
1831.

The case stood for judgment. On this day his Honor said, "As there is not any proof that *Dyer* was insol-

vent, for he paid the debt of the detaining creditor, I am of opinion, that, as there was a solvent partner, the proof was wrong, and must be expunged, and there must be a new choice of assignees.

“ With respect to the application to prove under section 62, I am satisfied that it applies only to subsisting partnerships at the time of the bankruptcy.”

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MORRIS.

In the matter
of
DESORMEAUX.

HITCHENS *v.* CONGREVE, DUNSTON, and others; and HITCHENS *v.* Assignees of DUNSTON.

V. C.

1831.

Trin. Term.

Witnesses examined after bankruptcy not evidence against assignees.

On a supplemental order directing payment of money into Court ; not a judgment within the bankrupt law, but a specific equity upon the fund, protecting it for the parties ultimately entitled, against the assignees under a bankruptcy taking place between the order and the decree.

THIS was a suit instituted by certain shareholders in the *Arigna* Mining Company, on behalf of themselves and all other shareholders, except the defendants, against the chairman and acting directors of the company. Those individuals, it was alleged, had charged 25,000*l.* to the company, as the consideration paid for the lease of certain mines, in which the adventure was to be carried on, although they had purchased it for the sum of 10,000*l.* only. The 15,000*l.*, making the difference, had been distributed in various proportions, as a bonus among the several defendants. It charged that this distribution was a gross fraud upon the partnership ; and that the defendants ought, therefore, in equity, to be regarded as trustees, to the extent of the sums they had received ; and it prayed that they might be decreed to refund what they had so respectively received, and pay it into the bankers of the company, for the use of the proprietors at large.

The answer of the defendant *Dunston* admitted the receipt of a sum of 1,047*l.*, as paid to him by way of bonus at a meeting of directors ; and upon that ad-

16 Jan 1832

2 Dec 1831

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—
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mission a motion was made, on the 22d May 1828, that *Dunston* should pay the sum in question into Court; and it was ordered accordingly.

The answers were replied to, and witnesses were examined; and, before publication had passed, viz. in June 1830, a commission issued against *Dunston*. In August 1830 the same plaintiffs filed their supplemental bill against the assignees of *Dunston*, praying the benefit of the original suit, and the proceedings against them.

The assignees put in their answer; the plaintiffs replied to it; proceeded with the examination of the witnesses; and publication having passed, the original and supplemental cause now came on for hearing.

In the course of the hearing it was objected for the assignees, that none of the evidence was admissible against them, except such witnesses as had been examined after the suit of *Hitchens v. Dunston*, to which alone they were parties, had been at issue; that the original defendant, *Dunston*, having become bankrupt in June 1830, the suit had become defective, and that nothing done therein was binding upon the assignees. *Monteith v. Taylor*, 9 Ves. 616; 4 Madd. Rep. 171; *Porter v. Cox*, 5 Madd. 80; *Randall v. Mumford*, 18 Ves. 425; Lord Redesdale's Treat., p. 51. That it was like the introduction of new parties by amendment, as to whom evidence previously taken cannot be read. *Quantock v. Buller*, 5 Madd. R. 81; *Pratt v. Barker*, 1 Simon, 5.

The VICE-CHANCELLOR ruled, that no witnesses examined in the original suit were admissible against the assignees, except those only who had been examined before the time of the defendant *Dunston's* bankruptcy.

or after issue joined in the suit to which they, the assignees, were parties; and that all the intermediate evidence must be excluded.

1881.

Ex parte
HITCHENS.
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of
CONGARVE
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The cause having proceeded, and the Vice-Chancellor being of opinion against all the defendants upon the merits, it was contended for the assignees, that as to *them* the assignment under the commission had overreached, by the effect of the 108th section 6 Geo. 4., the order under which the 1,047*l.* had been paid into Court; that the interlocutory order of a court of equity could have no higher effect than a judgment at law, the payment into court no higher character than a seizure by the sheriff: the money was, in either case, in *custodia regis*; and that while so, and before it was actually paid over to the plaintiff (*a*), the assignees, by the effect of the section referred to, and the decisions upon it, had a preferable claim. That the nature of the plaintiffs' case against *Dunston* was money had and received; and the only remedy against the bankrupt was, therefore, that of any other creditor, viz. proof of the debt.

The VICE-CHANCELLOR was of opinion, that, when the money was paid in under the order, it was specifically fixed with the equities of the plaintiffs, and, as such, was not within the operation of the 108th section of the 6th Geo. 4., or the decisions referred to.

The Solicitor General, Sir *E. Sugden*, Mr. *Lee*, and Mr. *Fane*, for the plaintiffs.

(*a*) *Notley v. Buck*, 8 *Barn. & Cress.* 160; *Morland v. Pellatt*, *ibid.* 722.

1831.

Mr. *Rose* and Mr. *Ching* for the defendants.

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HITCHENS.
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of
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Mr. *Pepys*, Mr. *Knight*, and Mr. *Lowndes*, for other
defendants. (a)

L. C.
June 4,
1831.

Ex parte COOK. — In the matter of
PETHERBRIDGE.

Where one
member of a
firm, who carries
on business on
his separate ac-
count, supplies
goods to the
firm, and a com-
mission issues
against the firm,
the debt is
proveable, but
not so for mo-
ney advanced.

THIS was a petition to reverse an order made by his Honour the Vice-Chancellor. The petition stated, that, previous to the year 1826, and up to December 1827, *William Petherbridge* carried on business in copartner-ship with *Haynes* and *Price* of Whitechapel, linen-drappers; that *William Petherbridge*, and his brother *Ebenezer Petherbridge*, commenced a partnership as linen-drappers at Newton Abbot, in Devonshire, which was carried on under the name and was conducted by *Ebenezer Petherbridge* alone; that *Ebenezer* opened an account with the firm of *William Petherbridge, Haynes, and Price*, and dealt with them; that such dealings consisted in *William Petherbridge, Haynes, and Price* selling linen-drapery goods to *Ebenezer*; that the dealings between the firm and *Ebenezer* were wholly distinct, and the same as if the firm had dealt with any other purchaser; that, in December 1827, the partnership of *Haynes, Price, and Petherbridge* was dissolved; that, immediately upon the dissolution of the partnership between *Haynes, Price, and Petherbridge, William Petherbridge* commenced business, on his own distinct and separate account, in Whitechapel, as a linen-draper; that *William*

(a) By 1 Will. 4. c. 7. s. . the 108th section of 6 Geo. 4. is not to extend to judgments after declaration. See p. 151.

Petherbridge continued to supply his brother *Ebenezer* for the Newton Abbot concern with linen-drapery goods in the way of his trade, and that such dealings were wholly distinct, and the same as if the dealings had been with any other purchaser or customer; that, on the 2d of September 1829, a commission of bankrupt was issued against *William Petherbridge*, in which the petitioners were chosen assignees; that *Ebenezer* was a debtor to him in the sum of 635*l.*; that, on the 4th day of December 1829, a joint commission was issued against *Ebenezer* and *William*, under which the petitioners were assignees; that the petitioners applied to prove the debt of 635*l.*; that the commissioners rejected the proof. The petition then prayed that the petitioners might be admitted to prove the debt of 635*l.* against the joint estate of *Ebenezer* and *William Petherbridge*. The Vice-Chancellor had dismissed the petition. From this decision this petition of appeal was presented.

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—
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Cook.
In the matter
of
PETHER-
BRIDGE.

Sir *Edward Sugden* and Mr. *Montagu* for the petition:—

It certainly is a rule that, in general, one partner cannot prove against another. The reasons assigned for this rule are, *first*, that a partner may be receiving payment before he has paid his own joint creditors; and, *secondly*, that he may stop *in transitu* a surplus to be taken from the separate to the joint estate. These are reasons, not for preventing a proof which may bar the partners' certificate, but for restraining the receipt of the dividend. This rule, however, has long been settled not to extend to distinct dealings between partners who are members of distinct firms of trade. The principle of this distinction is upon analogy to the doctrine of reputed ownership as to all the world; the dealings between distinct houses, composed partly of the same

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members, is of the same nature as dealings between distinct houses.

In *Curtis v. Perry*, 6 *Vesey*, 747, the Chancellor said, “ In this case of *Shakeshaft, Stirrup*, and *Salisbury*, all three, manufacturers in Lancashire, sold their goods in London in the names of *Shakeshaft* and *Stirrup* only. A credit was, therefore, acquired by them as three in Lancashire and two in London, which affected the distribution of their property in bankruptcy. It might, therefore, be contended, that where the order and disposition was, there the property, as among the creditors, should be taken to reside at the bankruptcy.” And in *ex parte Sillitoe*, 1 *Glyn & Jam.* 383, Lord *Eldon* says, “ I well remember the case of *Shakeshaft, Stirrup*, and *Salisbury*. There were four or five persons in a partnership; some of them carried on business in Liverpool, some in other places, and the credulous world took it for granted they were different concerns, though they were, in fact, so many wheels of one machine. Another relaxation of the rule was, therefore, admitted, that where there is a demand arising from a dealing by the partnership in a distinct trade, proof might be admitted. But then the question, What is a dealing in a distinct trade? is always to be looked upon with great care. I apprehend that the principle does not apply more to two persons who happen to be constituent members of a partnership of six, than to one or each of the six if one or each was a distinct trader. I take it to be quite clear, that if an individual partner has nothing more to say than this, that he has lent 100*l.* to his partnership, the strict rule immediately applies to him, and shuts him out from the benefit of proof. If it were sufficient to state, that the partner would not have lent the 100*l.* but as a separate trader, the rule is at an end.” This may be illustrated by the case of *ex parte Adams*, 1 *Rose*,

305, which was an application by the representatives of the *solvent* partner to prove, in which case the doctrine of reputed ownership does not exist. The Lord Chancellor says, "I am authorized to consider these two houses as distinct houses of trade; but it is impossible to say what *Adams's* representatives are entitled to prove, till the joint estate has been applied to the joint debts. I know no case where a solvent partner has been admitted to prove against creditors who have a demand against him."

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Ex parte
Cook.
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of
PETHER-
BRIDGE.

The rule then is, "When there are different and distinct firms, consisting partly of the same members, and one firm is solvent and the other bankrupt, the solvent firm cannot take a dividend against the bankrupt firm in competition with the joint creditors; but if both firms become bankrupt, proof may be made for such debt as if the dealings had been between strangers." (a)

The cases will be of two classes; first, upon proofs by the *greater* firm against the *less*; secondly, upon proofs by the *less* firm against the *greater*.

As to the first class, that is, upon proofs, by the *greater* firm against the *less*, *ex parte Hesham*, 1 *Rose*, 146, and *ex parte St. Barbe*, 11 *Ves.* 414, are proofs by two against one; and in *ex parte St. Barbe* the case of *Shakeshaft* is cited, which is a proof by three against two.

The next class is of a firm smaller in number of partners against a firm consisting of a greater number of partners. *Ex parte Johns, Cooke*, 345, is a proof by two against three.

(a) *Ex parte King, Cooke*, 538; *Johns, Cooke*, 533; *ex parte Shakeshaft*, cited in *ex parte Ruf- Hesham*, 1 *Rose*, 146; *ex parte fin*, 6 *Ves.* 123; *Curtis v. Perry, Adams*, 1 *Rose*, 305; *ex parte 6 Ves.* 743 and 747; *ex parte Silletoe*, 1 *G. & J.* 382.
St. Barbe, 11 *Ves.* 414; *ex parte*

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It is difficult to reason upon the supposition of the existence of a real difference, when not even an apparent difference can be discovered.

The reasons in favour of the proof of the one against two are, *first*, the analogous cases which have been decided; *secondly*, the principle upon which these cases have been decided, which is, that when there are distinct dealings the creditors are deluded by being told that there were not distinct dealings; and, *thirdly*, a dictum of Lord Eldon's, in *ex parte Sillitoe*, 1 Glyn & Jam. 383, which is as follows: "I apprehend that the principle does not apply more to two persons who happen to be constituent members of a partnership of six, than to one or each of the six if one or each was a distinct trader."

The reasons against the proof by one against the two are, *first*, a dictum by Lord Eldon, in *ex parte Adams*, 1 Rose, 306, where he says, "In none of the cases in which the partner constituting a distinct house has ever been admitted to prove has the estate against which he has been admitted been liable with that distinct house for joint debts." But this was clearly misreported, or is a mistake, as, in *ex parte Hesham* and *ex parte St. Barbes* it was a proof by one against two.

Secondly, a dictum by Sir John Leach, in *ex parte Cartell*, 2 Glyn & Jam. 127, which is as follows: "I concur in all the doctrine which in the printed case is attributed to the Lord Chancellor, except in this proposition, that there is no difference between the case of two or more partners carrying on a distinct trade and the case of one partner carrying on a distinct trade; and, as a general rule, one partner cannot prove a personal debt against the joint firm, because the creditors of the joint firm are his creditors, and he would be taking from his own creditors what ought first to be applied in payment of their debts. But where a firm of two or more partners

carry on a distinct trade, the creditors of the larger firm are not the creditors of the smaller firm; and, consequently, when the firm of two or more prove against the larger firm, they do not prove against their own creditors." But this is a mistake, as the whole doctrine of proof by distinct trades is founded upon the assumption, that the general rule as to the inability by one partner to prove against another does not extend to such cases. The dictum, therefore, of Lord Eldon, in *ex parte Adams*, being either a mistake or nullified by the dictum of his Lordship in *ex parte Sillitoe*, there remains only the dictum of Sir John Leach in *ex parte Castell*, which cannot be supported.

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Mr. Knight and Mr. Swanston submitted, that the case was governed by *ex parte Adams*, and that the doctrine of reputed ownership had not any application to the present question.

The case stood over for judgment.

The LORD CHANCELLOR stated, that in this case there were two firms; one, the larger, carrying on business in the country, and the other, the smaller, containing some, but not all of the partners in the larger, in town. Both of those firms had become bankrupt; and the question was, whether the assignees of the lesser, which was a creditor of the other, should be allowed to make proof of the debts without any qualification or restriction, against the assignees of the larger, so as to come in *pari passu* with the other creditors of that firm.

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The question was one of considerable importance, and if his Lordship had found no reason to think there was any conflict in the cases, he would not have taken the course he now felt inclined to adopt, which was to send

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the case for the opinion of the House of Lords, or for the opinion of the Court of King's Bench.

Mr. *Montagu* stated, that the sum in dispute was only the dividend, not, probably, more than 50*l.*; and that, as it was a question upon the construction of an equitable rule as to proof between partners, a Court of Common Law might not be inclined to decide.

The LORD CHANCELLOR:—

Undoubtedly it was not to be denied as a general principle, that where there are two firms carrying on trade, the one consisting of A. and B., the other of A. alone, (which was the case here,) A. himself, or, in the event of his bankruptcy, his assignees, could not be allowed to prove a debt under the commission against A. and B. on their becoming bankrupts, or to go in against their estate, along with the other creditors of that house, to a greater amount than his share as a creditor proving upon the surplus after the debts of the firm of A. and B. had been satisfied.

There might, perhaps, be a difference with respect to trading debts; debts, for example, incurred for goods procured by the London firm from other dealers in town, for the purpose of handing them over to the house in the country. Such dealers might be there entitled to consider themselves as directly, and in effect, creditors of the country firm, inasmuch as the London house was no more than a sort of funnel for the transmission of the goods; and there would seem no injustice, therefore, in allowing them to go at once *per saltē* and prove against the parties to whom the goods were really supplied. But with that exception, and speaking of the common case, of a demand arising either upon a money debt due by the larger firm to the separate trader, or

upon his claim to a share in the joint stock and profits, the rule was clear. The proof could only be made against the surplus. The consequence of an opposite rule would be most unjust. If the creditors of the single trader were allowed to prove along with the creditors of the joint traders in the country, without the restriction of limiting their proof to the surplus only, how was that to be distinguished in principle from the case of a debt due from the country firm to the several persons constituting that firm? From such a doctrine this would necessarily follow, that if there were two persons, A. and B., in partnership in the country, with a capital of 20,000*l.*, without deducting debts, to one half of which, or 10,000*l.*, each of them was entitled (for the partnership would be indebted to each to that amount); and if one of them, A., at the same time carried on business separately in town; the creditors of the latter might come forward and say, as against the country firm: "We are creditors of A., one of the persons composing your firm; he is entitled, as a partner, to 10,000*l.*, the amount of his capital in the firm; and that sum, therefore, shall be taken out and distributed among us, without deducting a farthing for the debts which may be due from him to the company:" in this way considering each individual partner's share in the partnership stock to be a distributable fund among the creditors of that partner, to the exclusion of the joint creditors.

Lord *Eldon* had repeatedly recognized the general principle; particularly in *ex parte Sillitoe*. He there laid down two exceptions: one which had no application here; the other, which in part was this case, where the separate trader had furnished goods to the larger firm. This Lord *Eldon* intimated was to be taken as a trading debt, contracted by the larger with the lesser, so as to let in the latter absolutely and at once

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to prove against the larger. There seemed to be great good sense and principle in the distinction; for when goods were furnished to a firm which merely handed them over to another, the latter was substantially the debtor to the parties who originally furnished the goods. His Lordship was, therefore, disposed to ascertain by an inquiry what debts came under the general rule, and what fell within the exception. In the case, however, of *ex parte Adams*, 1 Rose, 305, to which Lord Eldon did not appear to have applied his mind so anxiously and pointedly as in the case already referred to, no such distinction was taken, although the case was exactly the same with the present, it being there laid down generally, and without exception, that the debt of the separate trader was only capable of proof after payment of all the debts due to the creditors of the joint fund. For himself, he felt strongly inclined in favour of such an inquiry as had been suggested; but as there appeared to be some discrepancy between the cases, he should take further time to examine and consider the authorities.

On a subsequent day, the Lord Chancellor ordered the whole debt to be proved, and dividends to be paid upon the goods sold *pari passu* with the other creditors; and for the money advanced (a), a dividend to be paid out of the surplus, after payment of the general creditors. (b)

(a) *Ex parte Castell*, 2 G. & J. 126.

(b) The following is the order:
“ I do think fit to discharge, and do hereby discharge, the said order of his Honour the Vice-Chancellor, made on the hearing of the said original petition, on the 25th day of May 1830. And I do order that it be referred to the commissioners in

the said commission named, or the major part of them, to inquire whether any and what part of the said sum of 655*l.* 9*s.* 4*d.* was due and owing by the said Ebenezer Petherbridge and William Petherbridge, at the date and suing forth of the said joint commission, to the assignees of the said William Petherbridge, for goods sold and delivered by the

Ex parte RIX.—In the matter of RIX, GORHAM,
and INKERSOLE.

V. C.
WEST. H.
June 6,
1831.

THIS was a petition stating, that a joint commission had issued against the three :

That joint debts had been proved to the amount of 73,899*l.* 19*s.* 9*d.*; that 13*s.* 4*d.* had been paid on such

If a commission issue against three, and the joint estate is insufficient, and one partner pay the deficiency from his private estate, and there is a surplus on the separate estates of each of the others, the partner who paid the deficiency is entitled to such surplus before interest is paid to the separate creditors.

said firm of *Haynes, Price*, and *Petherbridge*, previous to the dissolution of the partnership between them, or by the said *William Petherbridge* alone, since such dissolution, to the said firm of *Ebenezer Petherbridge* and *William Petherbridge*. And I do order, that the said petitioners be and they are hereby at liberty to go in under the said commission of bankrupt awarded and issued against the said *Ebenezer* and *William Petherbridge*, and prove to the full amount of the sum which the said commissioners, or the major part of them, shall, upon such inquiry, find to have been due and owing as aforesaid; and that the said commissioners, or the major part of them, do receive and admit such proof accordingly. And I do order, that the said petitioners be paid dividends on the amount of what they shall so prove, rateably and in equal proportion with the rest of the creditors of the joint estate of the said bankrupts seeking relief under the said commission.

And I do further order, that it also be referred to the said commissioners, or the major part of them, to inquire whether any and what part of the said sum of 655*l.* 9*s.* 4*d.* was due and owing by the said *Ebenezer Petherbridge* and *William Petherbridge*, at the date and suing forth of the said joint commission, to the assignees of the said *William Petherbridge*, for money advanced by the said firm of *Haynes, Price*, and *Petherbridge* previously to the dissolution of the partnership between them, or by the said *William Petherbridge* alone, either before or since such dissolution, to the said firm of *Ebenezer Petherbridge* and *William Petherbridge*. And I do order, that the said petitioners be and they are hereby at liberty to go in under the said commission of bankrupt awarded and issued against the said *Ebenezer Petherbridge* and *William Petherbridge*, and prove to the full amount of the sum which the said commissioners, or the major part of them, shall upon such last-

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joint debts; that the residue of the joint estate was insufficient by 24,272*l.*; that to supply the deficiency, with interest, the petitioner had paid 26,227*l.* 18*s.* 6*d.*, and all the joint creditors had been fully paid:

That each of the other partners ought to have contributed 8,742*l.*:

That the separate creditors of *Inkersole* had been fully paid, and a surplus of 1,550*l.* carried over to the joint estate, which reduced the 26,227*l.* paid by the petitioner to 24,674*l.*:

That *Gorham's* separate creditors had been fully paid:

That there was a surplus of *Gorham's* separate estate:

The petition prayed, that the commission as to the petitioner might be superseded, and that the assignees might be ordered to pay to the petitioner all sums of money now in their hands, or hereafter to be received by them on account of the surplus of the separate estate of *James Gorham*, until the petitioner received the amount which *Gorham* ought to have contributed, with interest thereon.

Mr. *Spence* for the petition.

Mr. *Montagu* for the assignees:—

The question is, whether the separate creditors of

mentioned inquiry find to be due bankrupts seeking relief under and owing as aforesaid. And I the said commission shall have do order, that the said petitioners been paid 20*s.* in the pound on be paid dividends on the amount the amount of their several debts of such last-mentioned proof, proved under the said commis- when, and not before, the several sion; and for the better making other joint creditors of the said the aforesaid inquiries."

Gorham are entitled to interest before the surplus is carried to the joint estate? As between insolvent estates it is clear, that the creditors are not entitled to interest before the surplus is carried over. *Ex parte Boardmen, Cooke*, 199, 1 *Cox*, 275; *ex parte Clark*, 4 *Ves.* 677; *ex parte Young*, 2 *Rose*, 40; *ex parte Taylor*, 2 *Rose*, 175; *ex parte Minchin*, 2 *Glyn & Jam.* 287. But this rule is confined to insolvent estates, in which the Court has thought that each class of creditors should be paid.

When there is 20s. in the pound on each estate, the rule is different, as is thus stated by Lord *Eldon*, in *ex parte Reeve*, 9 *Ves.* 590, who says: "It is now, therefore, clearly settled, that where there is a partnership, and separate debts also, the partnership shall not be admitted a creditor upon any individual, nor any individual upon the partnership, until the creditors of the individual and the creditors of the partnership are satisfied to the extent of 20s. in the pound out of the respective estates; also, that where the separate creditors are paid 20s. in the pound, and there is a surplus, that surplus shall not go immediately to pay interest to the separate creditors, but shall go to make the joint creditors equal with them as to principal. No decision, however, has gone this length, that if both the joint and separate creditors are paid to the extent of 20s. in the pound, upon the payment to that amount to the creditors of each class a partner shall not be admitted a creditor upon the partnership or upon the individual. But I cannot distinguish the cases; for if the principle is, that neither the partnership nor the individual debtor shall claim in competition with the creditors, and if the creditors are entitled to any interest, the interest is as much a debt as the capital; and that principle will prevent either the partnership or the individual debtor ranking with the other creditors, until all their demand is satis-

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fied, which includes both the principal and interest of their debts."

The VICE-CHANCELLOR was pleased to order, that the surplus should be carried to the joint estate, without previous payment of interest to the separate creditors.

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If one of four partners die, and the surviving partners compromise, and obtain securities for, a debt due to the original firm, and become bankrupts, the securities are, by reputed ownership, distributable amongst the creditors of the three.

If goods are purchased and paid for by a firm of four, on joint account of themselves and two other firms, and one member of the firm of four die, and the goods are in the possession of one of the

two firms, upon the bankruptcy of the survivors the goods do not pass, by reputed ownership, to the assignees of the survivors.—If a firm consign goods to Hayti, which, after the death of one member, are returned, and a bill of lading from Hayti is sent to the holder of a bill of exchange dishonoured by the partnership, and the goods remain in the West India docks, they, upon the bankruptcy of the survivors, are not in their reputed ownership.—Goods in the hands of an agent are not in the reputed ownership of his principal.—If a firm is possessed, as mortgagees, of real estate, which, after the death of one member, remains in the possession of the survivors, it is not in their reputed ownership.

Ex parte TAYLOR. — In the matter of CAMPBELL, and in the matter of COLLINGS and MAINGY.

CAMPBELL, Bowden, Collings, and Maingy carried on, under the firm of *Campbell, Bowden, and Co.*, in London, and of *Collings and Maingy* at Rotterdam, business in partnership together, until the death of *Bowden*, which took place in 1821. The surviving partners continued to carry on the business until the bankruptcy of *Campbell*, in January 1826, which was shortly afterwards followed by that of *Collings and Maingy*.

The assignees having possessed themselves of property which had belonged to the partnership during the life of *Bowden*, orders were obtained under both commissions for keeping distinct accounts of the different estates.

Under these orders two accounts were prepared: the first containing an account of the assets of the partnership subsequent to the death of *Bowden*; and the second containing a like account previous to his death.

2 Nov. 14 Dec 1831.
14 Dec 1831.
1 Dec 1831.

The object of this petition, presented on behalf of the creditors of the surviving partners, was to have certain items transferred from the latter to the former account, on the ground that the property to which they related had been left in the order and disposition of the surviving partners.

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of
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The first item consisted of the produce of two promissory notes and a policy of insurance, received from *Ohman*.

Ohman had been employed as a clerk by the partnership in the life of *Bowden*, and had quitted the employment in debt to the partnership. After the death of *Bowden*, *Campbell*, on behalf of the surviving partners, received from *Ohman* the two promissory notes, and the policy, in lieu of the debt, and continued in the possession of them till his bankruptcy.

Mr. *Spence* and Mr. *Willcock*, for the petitioner, relied on the statute 6 Geo. 4. c. 16. s. 72., and cited *ex parte Williams*, 11 *Ves.* 3.

Mr. *Pepys* and Mr. *Seton*, for the respondent, (who was a creditor of the partnership during the life of *Bowden*,) contended that, upon the death of a partner, partnership property, left in the disposition of the surviving partners, was subject to a trust for payment of the bankrupt's debts, and was therefore not within the statute. *West v. Skipp*, 1 *Ves.* 242; *ex parte Williams*, 11 *Ves.* 6.

The VICE-CHANCELLOR held, that the debt, having been compromised by the surviving partner, was within the statute.

The next item consisted of the produce of cotton sold at Liverpool.

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The cotton had been purchased by the partnership, in the life of *Bowden*, on the joint account of *Campbell*, *Bowden*, and Co., *Bateson* and Co. of Liverpool, and *Garnett*, in shares of one third each. It had been paid for by *Campbell*, *Bowden*, and Co., but remained in the possession of *Bateson* and Co. up to the time of the bankruptcy.

For the petitioners it was contended, that the cotton was in the order and disposition of the surviving partners; and the will of *Bowden* was referred to, by which he directed that his property should be continued in the partnership.

For the respondents it was contended, that even if the goods had been in the possession of the surviving partnerships, they would have been in possession as tenants in common with *Bateson* and Co. and *Garnett*, and consequently that their possession would not have been within the statute, *ex parte Flyn*, 1 *Atk.* 187; and that the goods, not having in fact been in their possession, but in that of *Bateson* and Co., could not have been within the statute.

The VICE-CHANCELLOR held, that this item was not within the statute; and observed, that the creditors could not be affected by any thing contained in the will of *Bowden*.

The next item consisted of the produce of goods returned from Hayti.

These goods had been sold by the partnership, in the life of *Bowden*, to *Christophe* king of Hayti, who returned them. They were in the West India docks at the bankruptcy. The bill of lading from Hayti was sent to the

holder of a bill of exchange drawn on the partnership, which was not accepted, and was in his hands at the time of the bankruptcy.

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—
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For the petitioner it was contended, that, as it was in the power of the surviving partners, at any time, by accepting the bill, to obtain possession of the goods, they must be considered as in their possession.

For the respondent it was contended, that neither the goods nor the bill of lading having been in the possession of the surviving partners, the statute did not apply.

The VICE-CHANCELLOR held, that this item was not within the statute.

The next item consisted of the produce of cotton sent from St. Domingo.

At the death of *Bowden, Sureau* and Co. of St. Domingo were indebted to the partnership. After the death of *Bowden, Campbell*, as surviving and sole acting partner, employed *Wylie* as his agent to recover the debt. The coffee was consigned to *Wylie*, in part liquidation of the debt, and was in his possession at the time of the bankruptcy; and he claimed a lien upon it for freight.

For the petitioner it was contended, that *Wylie*, being the agent of the surviving partner, his possession was that of his principal.

For the respondent it was contended, that the goods being in the hands of a third person, who claimed a lien, were not within the statute; *Greening v. Clark*, 4 B. & C. 316.

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The VICE-CHANCELLOR held, that this item was not within the statute.

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The next item consisted of the produce of the sale of a plantation in Berbice.

The plantation, with the slaves and utensils upon it, was mortgaged to the partnership in 1806. The mortgagees shortly afterwards entered into possession, and in 1818 brought it to sale under an execution, and became the purchasers; but it was not then conveyed to them, in consequence of a suit having been instituted in Berbice, by the legatees of a former proprietor of the estate, who claimed a priority over the mortgagees. A sentence having been obtained by the legatees in their favour, which was afterwards reversed on appeal, the estate was conveyed, in 1824, to *Campbell, Bowden, and Co.*, and their heirs, and continued in the possession of the surviving partners till the bankruptcy.

For the petitioner it was contended, that the original debt was a chose in action, and within the statute; and that notwithstanding the sale, the estate still represented the debt; and that supposing it otherwise, the real estate of a partnership was to be considered as a personal estate. *Townsend v. Devaynes*, 1 Mont. on Partnership, App. 97; *Selkrig v. Davies*, 2 Dow. 242.

The VICE-CHANCELLOR, without calling on the counsel for the respondents, observed, that the argument was opposed to the statute, and to all the decisions, in which real estate, and mortgages on real estate, had been held not to be within it; that, except as between the partners themselves and their representatives, the real estate of a partnership retained its original character, and that it was impossible to hold this item within the statute.

The last item consisted of the produce of consignments from the estate, and as to this no inquiry was made: no evidence had been entered into respecting it.

The Vice-Chancellor refused an inquiry, but directed that the order on the petition should be without prejudice as to this item.

The order made was for a transfer of the first item, according to the prayer of the petition; as to the other items, the petition was dismissed, but without prejudice as to any question as to the last item. The costs as to the first item were to be paid out of the estate of the partnership previous to the death of *Bowden*, and the rest of the costs out of the estate of the surviving partners. (a)

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(a) The following cases relate to the question, Whether real estate is within the statute? estate was not within the stat. 6 Geo. 4.

Mortgages of real estate, though for a term, held not within the stat. 21 Ja. 1, c. 19, s. 11, *Ryal v. Rolle*, 1 *Atk.* 165, S. C. 1 *Ves.* 348.

So assignment of mortgages on West India estate, though not registered, and no notice given to mortgagor, *Jones v. Gibbons*, 9 *Ves.* 407.

So fixtures, though held for a term, *Ryal v. Rolle*, *supra*; *Horn v. Baker*, 9 *T. R.* 215.

So moveables, where it is customary to let them, *Storer v. Hunter*, 3 *B. & C.* 368, and in *Horn v. Baker*, *supra*.

In *ex parte* Vauxhall Bridge, 1 *G. & J.* 106, it was held, that a share in a company seised of real

But in *ex parte* Lancaster Canal, 1 *Mont.* 116, such shares were held to be within the statute.

The following cases relate to the question, Whether joint tenancy by partners of real estate is to be held tenancy in common.

Purchase of lands for a joint undertaking held a tenancy in common, *Lake v. Craddock*, 3 *P. W.* 158.

So joint lease to partners in a farm, *Elliot v. Brown*, 1 *Vern.* 217, note, S. C. (cited) 9 *Ves.* 597, 3 *Swan.* 489, note.

So purchase of freehold or leasehold for the purpose of trade, *Lyster v. Dolland*, 3 *Bro.* 480, S. C. 1 *Ves. jun.* 435.

The following cases relate to

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1831.

A surplus of
separate estate
must be carried
to a deficient
joint estate be-
fore payment is
made on a vo-
luntary bond.

Ex parte SPURRIER.—In the matter of SPURRIER.

THERE was a surplus on the separate estate: the joint estate was deficient. It was held, that the surplus must be carried to the joint estate, before any payment was made to a creditor on a voluntary bond. (a)

Mr. Swanston for petition.

Mont. & Devaynes 575.

Mr. Knight contra.

the question, Whether the real estate of a partnership is to be considered as personal estate.

Formerly it was held, that the real estate of a partnership was not to be considered as personal estate, without express agreement. See *Thornton v. Dixon*, 3 Bro. 199; *Bell v. Flyn*, 7 Ves. 453; *Bateman v. Shore*, 9 Ves. 500; *Stuart v. Marquis of Bute*, 11 Ves. 665; and see *Smith v. Smith*, 5 Ves. 189.

But it has since been held, that as between the real and personal representatives of partners, real

estate is to be considered as personal, *Townsend v. Devaynes*, 1 Mont. on Partnership, App. 97; and see *Selkrig v. Davis*, 2 Dow. 242; *Crawshay v. Maule*, 1 Swan. 508. 521.

It seems, however, that, except as between the real and personal representatives of partners, the real estate of a partnership retains its original character. See *S. C. S.* and *ex parte Taylor*, *supra*.

(a) See, to same effect, Assignees of *Gardner v. Shannon*, 2 Sch. & Lef. 230.

Ex parte HANCOX.—In the matter of CAVENAGH,
BROWN, and BROWN.

V. C.
June 16,
1831.

THIS petition stated, that, upon the marriage of *Ann Heyward*, certain of her property was settled in trust, with a power of appointment by will in the said *Ann*; that the marriage took effect; that *Brown*, one of the bankrupts, was the trustee; and that the power of appointment had been duly executed in favour of the petitioner. The petitioner further stated, that the petitioner was entitled to all the settled property.

The prayer was, that *Brown* and the assignees might assign 3,150*l.* stock, with all the other trust property, to the petitioner.

Where, upon the bankruptcy of a trustee, one person is solely entitled to all the trust estate, the Court will, upon petition in bankruptcy under 6 G. 4. c. 16. s. 79. order the bankrupt to transfer and deliver it to such person without a new trustee.

Mr. *Knight* and Mr. *Parker* for the petition.

Mr. *Rose*, *contra*, objected, that the Court had not jurisdiction thus to order the funds to be transferred to the petitioner; the jurisdiction being confined to the transfer, not to the cestuique trust, but to the new trustees. The words of the clause being, “shall convey, &c. to such person, &c. as the Lord Chancellor shall think fit, upon the same trusts as, &c. they were subject to.” (a)

(a) Section 79 is as follows: vernment stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the person or persons entitled in possession to the receipt of the rents, issues, and profits, dividends, interest, or produce there-
“And be it enacted, that if any bankrupt shall as trustee be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any go-

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1 Dec 4 1832.
1 Dec 1837.

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of
CAVENAGH
and others.

The VICE-CHANCELLOR:—The object of the act is to prevent the expense and delay attendant upon a bill; and as in a bill it could not be deemed necessary to nominate a trustee when the trusts are executed, so, in the present case, instead of the useless nomination of a trustee, where there is no trust to be performed, I shall, under the words and within the spirit of the act, direct the property to be transferred to the petitioner.

The order was made as prayed.

V. C.
June 16,
1831.

Ex parte BOOTH and INGLEDEW, and *ex parte* GARRATT and MILLER.—In the matter of MILES.

If four persons are chosen assignees, and at the choice it is verbally agreed that one shall act, and notice is given to the banker to pay the drafts of the one, and a dividend is declared, and notice is given to the creditors, "that they may receive the dividend upon application to the assignees," and the acting assignee pay the dividends by checks which are dishonoured, he having overdrawn the account, and absconded: The other three assignees are liable.

THE petitioners had proved debts under the commission. *Clapham, Hagg, Parker, and Watson* were assignees. *Clapham* had consented to his appointment, with the express stipulation, that *Watson* should act for him in the administration of the bankrupt's estate, to which, from the distance of his place of residence, he could not personally attend. The creditors present consented to this arrangement. Subsequently to this, *Garratt*, the solicitor to the commission, and *Clapham*

of, on due notice given to all other persons (if any) interested therein, to order the assignees, and all persons whose act or consent thereto is necessary, to convey, assign, or transfer the said estate, interest, stock, funds, or annuities to such person or persons as the Lord Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds, or annuities were subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect; and also to receive and pay over the rents, issues, and profits, dividends, interest, or produce thereof, as the Lord Chancellor shall direct."

11 July 38.

4 Dec 26 134

2 Mont 26 97.

informed *Backhouse* and Co., the bankers to the estate, that all the cheques upon them would be drawn by *Watson*. On the day of *Garratt* wrote the following circular to the creditors :

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Ex parte
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and others.
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of
MILES.

“ *Miles*’ bankruptcy.

“ The creditors who have proved their debts against the estate of *Thomas Miles* may receive a dividend of 4s. in the pound, in respect of the debts so proved, on application to the assignees, at the Black Lion Hotel in Stockton aforesaid.

“ WILLIAM GARRATT,

“ Solicitor to the assignees.”

The dividends were paid in cheques by *Watson*. *Watson* absconded, having overdrawn the account of the assignees; and there were no funds out of which to pay the dividends.

This was a petition calling upon all the assignees to pay the dividends.

Mr. *Richards* for the petitioners.

Mr. *Knight* and Mr. *Rose*, for the assignees, cited *Wackerbeth v. Powell, Buck*, 496; *ex parte Griffin*, 2 Gl. & Ja. 114.

The VICE-CHANCELLOR: —

In the present case four assignees were chosen. At the time of choice a verbal representation was made, that *Watson* was to be the acting assignee. *Backhouse* and Co. were appointed the bankers; the money was to be paid in the name of all the assignees, and the bankers were directed to pay *Watson*’s drafts. But the creditors were no parties to this arrangement, and were not bound by it.

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 and others.
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 of
 MILES.

When the dividends were declared, the circular was sent to the creditors, which was a notice to apply to the assignee for the payment of the dividends. I think the three assignees liable.

Ordered accordingly.

V. C.
 June 17,
 1831.

Ex parte HARRISON.—In the matter of
 REMINGTON and Co.

On petition for payment of dividend, which is unsuccessfully opposed by the assignees, interest at five per cent., and costs, are of course against the assignees, who, if they acted *bona fide*, may reimburse themselves out of the estate.

A PETITION was presented for payment of a dividend and interest; the assignees presented a cross-petition; the Vice-Chancellor directed an issue to try the validity of the debt; the verdict was for the petitioners.

The present petition prayed, that the assignees might pay the dividend, with interest at 5*l.* per cent. from the 21st of June 1829 to the day of payment, together with the costs of the issue, &c.

Mr. Rose and *Mr. Roots* for the petitioners.

Mr. Knight and *Mr. Richards* for the assignees:—
 The order is of course so far only as relates to the payment of the dividend. As to the interest, it is never ordered under such circumstances as the present, but by way of a mulct or fine on the assignees, and as a punishment on them for their personal misconduct in detaining from a creditor what was justly due to him. But it is impossible to say that the assignees have misconducted themselves in this case: that they were right in disputing the question appears from the Court having ordered an issue. Then, if the interest is not to be paid by the assignees personally, it cannot be paid out of the estate,

for which no precedent can be found. But supposing that interest ought to be paid, it ought to be at four per cent. only.

Mr. *Rose*, in reply:— If any interest is to be paid, it is at five per cent.; this was decided by *ex parte Loxley*. (a) The only question is, whether the interest is to be paid by the assignees personally, or is to come out of the estate? That it ought to be paid by the assignees personally, appears from the 111th section of the bankrupt act, which enacts, “ that no *action* for any dividend shall be brought against the assignees by any creditor who shall have proved under the commission; but if the assignees shall refuse to pay any such dividend, the Lord Chancellor may, on petition, order payment thereof, with interest for the time that it shall have been withheld, and the costs of the application.” In this case the assignees have withheld a dividend, and a petition has been presented in pursuance of this section, praying for interest for the time during which it has been so withheld. The only effect of this section of the act is to substitute a petition in the place of an action. If before the act of 6 Geo. 4. an action had been brought, nothing more would have been necessary than to prove the order of dividend, and the demand for its payment, and then interest at 5℥. per cent. would have been given as damages.

VICE-CHANCELLOR:— The analogy to what would have been the result of an action must govern in the case of a petition; so that the assignees must be held personally liable to the petitioners for the interest and costs.

1831.

—
Ex parte
HARRISON.
In the matter
of
REMINGTON
and others.

(a) 1 *Glyn & Ja.* 545.

1831.

Ex parte
HARRISON.
In the matter
of
REMINGTON
and others.

The legislature, however, only intended that the assignees should pay personally, in cases where their conduct was grossly improper; and, as in the present case they resisted payment from proper motives, I think they may reimburse themselves out of the estate.

V. C.
June 21,
1831.

If a petitioner reside in Scotland, the signature of the petitioner is sufficient, and the petition need not be signed by an agent in England.

Ex parte PAUL. — In the matter of MONTEITH.

THE petitioner resided in Scotland; and the petition was signed, not by an agent, but by the petitioner.

Mr. *Rose* and Mr. *Stewart* objected, that it ought to be signed by the agent, as the object of the order was to have a person within the jurisdiction who would be responsible for costs.

Mr. *Knight* and Mr. *Montagu*, *contra*, said, that the signature by an agent only applied when the party was out of the kingdom; and that Scotland, although not in England, was not out of the kingdom; and they cited *ex parte Cumming*, *ante* 206.

The VICE-CHANCELLOR held that the signature was sufficient, the word in the order not being country, but kingdom. (a)

(a) See the order, *ante* 206, in note.

Ex parte SAMMON. — In the matter of SAMMON and PIERSON.

UPON this petition a question arose, Whether the operation of section 132 of the 6 Geo. 4, c. 16, has a retrospective operation? (a)

Sir C. Wetherell, Mr. Montagu, and Mr. Wheatly for the petition: — The question is settled in *ex parte Shepherd*, 1 Mont. & Mac. 67, from which this petition is virtually an appeal.

Since this act there have been different cases with respect to the retrospective operation of the different clauses of the statute; in some of which the act has been decided to be retrospective, in others not.

The clauses which have been adjudged *to be retrospective* are, sections 54 and 55, respecting annuities,

(a) The following are the words of the clause: "And be it enacted, that the assignees shall, upon request made to them by the bankrupt, declare to him how they have disposed of his real and personal estate, and pay the surplus, if any, to such bankrupt, his executors, administrators, or assigns; and every such bankrupt, after the creditors who have proved under the commission shall have been paid, shall be entitled to recover the remainder of the debts due to him; but the assignees shall not pay such surplus until all creditors who have proved under the commission shall have received interest upon their debts, to be calculated and paid at the rate and in the order following; (that is to say,) all creditors whose debts are now by law entitled to carry interest, in the event of a surplus, shall first receive interest on such debts at the rate of interest reserved or by law payable thereon, to be calculated from the date of the commission, and after such interest shall have been paid, all other creditors who have proved under the commission shall receive interest on their debts from the date of the commission, at the rate of four pounds per centum."

first 412.

V. C.
June 27,
1831.

Section 132, as to payment of interest, is not retrospective.

1 Mont & Mag.

681.

4 Dec & 68.

3 May & 689.

1831.

—
Ex parte
 SAMMON.

In the matter
 of
 SAMMON
 and another.

Bell v. Bolton, 4 Bing. 615; section 56, respecting contingent debts, *ex parte Grundy*, 1 Mont. & Mac. 293; section 82, with respect to relation, *Tenington v. Hargreaves*, 5 Bing. 491, and *Churchill v. Crease*, 5 Bing. 178.

The clauses which have been adjudged not to be retrospective are, section 92, as to evidence, *Kay v. Goodwin*, 6 Bing. 576; section 73, as to voluntary conveyance, *Wombwell v. Laver*, 2 Sim. 360; section 127, as to third commissions, *Ibberson v. Dicas*. (a)

(a) A rule having been obtained to show cause why the sheriff of Surrey should not have further time to return the writ of *fi. fa.* directed to him, and under which he had levied, on shewing cause the following facts were disclosed. Two writs of *fi. fa.* had issued at the suit of two creditors with separate interests, named *Robinson* and *Ibberson*, against the goods of the defendant *Dicas*, and the sheriff had levied. As soon as he had put a man into possession, he received notice from the assignees of the defendant under the second of two commissions of bankrupt which had issued against the defendant, stating that, as the defendant's estate under the second commission had not paid fifteen shillings in the pound, his property vested in the assignees under that commission. Both commissions were before 6 Geo. 4, c. 16. The sheriff having been ruled to return the writ, the above rule

was applied for. Whether the property of the defendant vested in the assignees, or not, depended on the construction to be put on 6 Geo. 4, c. 16, s. 127. The words of that section are these: "And be it enacted, that if any person who shall have been discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained, or shall hereafter obtain, such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife, and children)

From these opposite decisions it is clear, that every new enactment has not a retrospective operation; and the cases contain a rule by which the present and future decisions may be regulated. In *Kay v. Goodwin*, 6 Bing. 584, the Lord Chief Justice says, "That brings us to the more important question, whether that 92d section has a retrospective effect; or, more properly, whether it has any operation on commissions that were issued before the act passed: and I think the sound construction of the section, taking at the same time into consideration the 93d section which follows it, and also the 135th, is to hold that it would not have such operation.

"It appears to me, that if the 92d section is considered as affecting commissions which were then in a course of operation, it would materially alter the situation both

shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such a bankrupt was possessed at the issuing the commission." The words in italics are new.

The court was of opinion, that this section did not vest the goods of the defendant in the assignees under the second commission. The provision with respect to vesting such property in the assignees was not contained in the 5 Geo. 4, c. 30, the previous bankrupt act. It was a new provision, therefore, and there were no words in the section which could shew that it was the intention of the legislature to extend it to the cases

under the former bankrupt acts. On the contrary, the language of the section clearly shewed that it was intended to be prospective. Though that was the opinion of the Court, yet as it appeared a question liable to doubt, the sheriff ought to have time to consider the course he would pursue. The rule, therefore, would not be made absolute in the common form, but for enlarging the rule to return the writ until the end of the next term. He might of course in the meantime come to the Court, and apply to enlarge the time still further. Rule absolute. *Littledale, J., K.B.M.T.* 1830, *Ibberson v. Dicus*, and *Robinson v. Dicus*. See Legal Observer, 109.

1831.

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Ex parte
SAMMON.
In the matter
of
SAMMON
and another

1831.

Ex parte
SAMMON.
 In the matter
 of
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of the bankrupts and of the parties claiming a remedy under the commission. It would alter the situation of the bankrupt, because it would enable his assignees, and would enable other persons, to conclude him as a bankrupt, without the possibility of his contesting his bankruptcy within that period of time which the statute meant to allow him. It is only to suppose that he had been adjudicated a bankrupt more than two months before this act passed, or, that being absent from England, he had been absent a whole twelvemonth, and he is at once effectually concluded to all intents and purposes from all benefit of contesting the commission issued against him. It would also materially affect the interests of other persons, because, whenever this conclusion of evidence is to take effect, the 93d section has provided that parties who were called upon to pay their debts should have a power, by the space of two months, to pay their money into court, during which time this question of bankruptcy might be tried; that power would also be entirely taken away from them, and this construction would entirely deprive them of the benefit of that clause.

“ It seems, therefore, to me, that the 135th section, which states that the construction of this act shall be such as not to affect or lessen any right, claim, demand, or remedy which any person now has thereunder, or upon or against any bankrupt against whom any commission shall have issued, (and so on,) would not be observed if we were to put a different construction upon the act from that which I have stated.

“ It has been said, that there are several cases in which the construction of this act of parliament has been, that it should apply to commissions which had been issued and were then in the course of operation. That may

be the case when the law has been altered in general terms, or old provisions are re-enacted. Such a general alteration of the law will apply as part of the law of bankruptcy to commissions issued before the new law; but when new provisions are introduced, which apply to particular cases, and give entirely new remedies, we must look to the very words of the sections, in order to see whether they apply or not to by-gone and then existing commissions.

“ It seems to me, applying that rule to the 92d section, that it was not the intention of the legislature that it should affect commissions then in existence.”

In addition to these decisions and this rule, the point was decided, a few days since, in the case of *Upton v. Bridges*, in which the Lord Chancellor determined, that the clause had not a retrospective operation.

Mr. *Pepys*, Mr. *Knight*, and Mr. *Garra*t, *contra*.

The VICE-CHANCELLOR said, he considered the question to be settled, and that the clause had not a retrospective operation.

Ex parte KEMP. — In the matter of DENNET LODGE.

PETITION to supersede, on the ground that two of the commissioners were creditors. Two applications to strike dockets were made at the secretary's office, by the respective agents of the petitioner and of *Tulloch*. Lots were drawn, and the result was in favour of *Tulloch*; but, at the time of drawing lots, it was not known that two of the commissioners under *Tulloch's* commission

1831.
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Ex parte
SAMMON.
In the matter
of
SAMMON
and another.

V. C.
June 29,
1831.

If, after drawing lots in the bankrupt office, it is discovered that two of the commissioners named by the party in whose favour the lot fell are creditors, the Court will prefer the other docket.

1 Mont & Ay 2 473.
3 — 56.
2 Dec 237.

1831.

were creditors. On discovering this fact, this petition to supersede was presented.

Ex parte
KEMP.
In the matter
of
LODGE.

Mr. Knight, Mr. Montagu, and Mr. Jacob for the petition: —

By the words of the order, if two or more persons apply at the same time to strike a docket against the same person, and both are prepared forthwith to issue a commission, it shall be determined by lot to whom the commission shall issue; if only one is prepared, it shall be issued to him who is prepared. (a)

This commission, therefore, ought not to have been issued upon the petition of *Tulloch*, who was not prepared, but on the petition of the petitioner, who was prepared. In *ex parte Mathews*, 1 G. & J. 165, a commission was superseded because two of the commissioners were creditors; and, even if there were any doubt in the case, it has been the habit of the Court to prefer the commission which is most free from objections, *ex parte Mair*, 19 Ves. 540.

Mr. Rose and Mr. Koe *contra*: —

There can be no necessity to adhere to the strict letter of the order, when there has been a compliance with the spirit, by the nomination of commissioners of respectability.

This is merely for costs. There is no doubt of the respectability of the parties; and the Court has always been in the habit of exercising its discretion as to the construction of its own orders. There cannot, therefore, after the proceedings have been continued for some time, be any necessity for a supersedeas; but, if the Court should think it necessary, it is possible, without

(a) Order of 29th December 1806.

supersedeas, to substitute other commissioners, not creditors, by ordering the commission to be renewed.

1831.

—
Ex parte
KEMP.
In the matter
of
LODGE.

The VICE-CHANCELLOR: — This is a case where the parties have directly violated the order, and they must be amenable for the consequences.

Commission superseded, with costs.

1831, July 1.

Ex parte RICE. — In the matter of OLDFIELD.

L. C.
July 1,
1831.

SPURR and *Rice*, who were solicitors, were elected assignees. This was a petition by *Spurr* to remove *Rice*, for reasons not material to the point which incidentally arose as to the right of *Spurr* to be an assignee.

The Court will not permit the solicitor to the commission, nor his partner, to be assignee.

Mr. *Swanston*, for *Rice*, said, “ The inconvenience of a solicitor being an assignee was evident. As solicitor he must be desirous of business, and has an interest to create suits. In regard also to his bill of costs, he has inconsistent interests. In *ex parte Steele*, 16 *Ves.* 166. which was a petition to supersede, Lord *Eldon* said, ‘ *Dicas* acted as solicitor to the commission: it would have been better if he had not; but that is no ground for superseding the commission: and the same observation applies to his choosing himself assignee under such circumstances.’ In *ex parte Reid*, 1 *G. & J.* 77, the same principle, with respect to accountants, is expressed by Lord *Eldon*, after conference with the Vice-Chancellor; in which case it is said that the offices are inconsistent, as, instead of filling the office of assignee without reward, they receive considerable sums out of the estate in their capacity of accountants.”

1831.

Ex parte
RICE.In the matter
of
OLDFIELD.

The LORD CHANCELLOR:—It appears to me, that the offices are inconsistent, and that neither the solicitor to the commission nor his partner ought to be assignee. (a)

V. C.

Aug. 4,
1831.

If two dockets are struck, one omitting to state that the bankrupt traded in London, and the other giving a perfect description: the Court will prefer the perfect description, although the majority of trade and creditors are in the country, where both commissions were intended to be worked.

Leave of the Court must be obtained to issue a country commission against a London trader.

Ex parte HILL and another.—In the matter of
BROOM.

THE petition stated, that, on the 2d of August, two dockets had been struck against the bankrupt; one by the petitioners, describing him as “of Kidderminster, and of St. Michael’s Court, Poultry, London;” the other by *Lloyd*, which had been received at the office: that *Lloyd’s* docket did not disclose the fact of *Broom’s* being a London trader, nor was any order obtained by him to issue against *Broom*, being such London trader, a country commission; and praying that the commission might issue on the docket of the petitioners, not upon that of *Lloyd*.

Mr. *Knight* and Mr. *Montagu* for the petitioner:—

It is a rule which has been acted upon for a century, that, where a country commission is to be issued against a London trader, a special application must be made to the Chancellor, upon an affidavit, stating that the major part of the creditors reside in the country. There is no printed order to this effect; but the practice has existed ever since the establishment of London lists.

There is another rule, that, in a question, which of two dockets should stand? that should be preferred which is most free from objection.

(a) See *ex parte Badcock*, 1 *Mont. & Mac.* 243, where the same opinion is expressed by Lord *Lyndhurst*.

1 Mont. & Mac. 243

The docket which has been received in the office does not notice that the bankrupt was a London trader; and no application was made to the Court for permission to issue a country commission. It is, therefore, defective in two respects: 1st, In not having made the application; 2d, In not containing a full description.

1831.
—
Ex parte
HILL
and another.
In the matter
of
BROOM.

Mr. *Swanston* for the respondent: —

The rule applies only to the case where the trader resides in London, or carries on business wholly in London; but in the present case he resided wholly in the country, where the great bulk of his business was transacted, and where the great bulk of his creditors reside.

This very point arose before Lord *Eldon*, in the matter of *Tunstal*, on the 28th of February 1826. The bankrupts were described as “bankers at Huddersfield.” They were also hop-factors in the borough; but were not so described in the commission. An application was made to supersede, with liberty to the petitioners to take out another commission, which was refused by Lord *Eldon*.

And, in the present case, the application by the petitioner is not for a London commission, but for a country commission, which is to be issued upon the docket that has been received.

The VICE-CHANCELLOR: — When there are two dockets, of which one is free from objection, and gives full information to the creditors, and by the other the creditors may be misled, the Court, it is scarcely necessary for me to say, will prefer that which is free from objection. Upon the ground, therefore, that the docket of the petitioner is full, and free from objections, I should prefer it to the docket which has been received, and by which the London creditors may be misled. But, inde-

1831.

Ex parte
HILL
and another.
In the matter
of
BROOK.

pendent of this objection, the creditor whose docket has been received has not obtained leave of the Court to issue a commission against a London trader. With respect to the MS. case which has been cited by Mr. *Swanston*, the facts are not so fully before the Court as to warrant me in placing any reliance upon it. If the commission had issued and been in operation, which possibly was the case, the Court might decline to supersede (a); but in an incipient case like the present,

(a) The following is the note in the book at the bankrupt office:—“*Tunstall, re Dobson and Co., Huddersfield, banker, being also Southwark hop-factor. Mr. Koe praying supersedeas, and another commission fully describing bankrupt. Affidavit of a creditor of bankrupt as hop-factor. Rose contra. Affidavit of Weare, cashier of Huddersfield bank, and of G. Tunstall. Koe replies; no order, but person who took out a commission without proper description well off; no costs prayed against him. No costs.*”

“*Ex parte Tunstall, re Dobson.*”

“*First Docket.*”

“Bankrupt’s description. ‘*John Dobson and William Beevers Dobson, of Huddersfield, in the county of York, bankers, dealers, chapmen, and copartners, carrying on business as bankers at Huddersfield aforesaid, under the firm of John Dobson and Sons.*’

“*John Carr of Huddersfield, petitioning creditor.*”

“Docket dated 12th Dec. 1825.

“Commission issued 14th Dec. 1825.

“*Jacques and Battye,*
“Solicitors,

“50, Coleman Street.

“And assignees chosen.

“*Second Docket.*”

“Bankrupt’s description. ‘*John Dobson and William Beevers Dobson, of the borough of Southwark, in the county of Surrey, hop merchants, carrying on trade in copartnership, under the stile or firm of John Dobson and Company.*’

“Docket dated 19th Dec. 1825.

“No Commission.

“*George Tunstall, petitioning creditor.*”

“*Cardale and Burton,*
“Gray’s Inn,
“Solicitors.

“22d Dec. 1825.—*Tunstall’s petition presented, and many affidavits filed pro. and con.; and, 28th February 1826, the hearing before Lord Eldon.*”

where there have been no further proceedings, except striking the docket, that docket ought to be preferred which is unobjectionable. The same point was before me a short time since, even after the bankruptcy was found, and I ordered the commission to be superseded. (a) Let the prayer of the petition, therefore, be granted.

1831.

Ex parte
HILL
and another.
In the matter
of
BROOM.

Ex parte WISWOULD and DUNCAN.—In the matter of WISWOULD and DUNCAN.

V. C.
Aug. 10,
1831.

PETITION to supersede a joint commission against the petitioners; who, with many other persons, were owners of a steam-packet; and the commission had issued against them as carriers.

Shareholders of
a steam packet
are not traders.

2 Months.

Mr. *Rose* and Mr. *Knight* for the petition :—

The word “carrier” is not used in the enumeration of tradings in the act. It cannot be contended that a holder of shares in such a vessel constitutes such trading. If the statute had intended to include shareholders in a vessel, the words would not have been confined to “shipwrights” and other trades connected with ship-

(a) 20th July 1831. In the short time carried on trade in matter of *Isaacs*, *ex parte* *Big-nold*. The petition stated, that a commission issued to Norwich; that *Isaacs* resided at Norwich, where he had traded for many years; that since the commission had issued, the petitioner had discovered that he had for a Oxford Street. The commis-sioners had adjudged the bank-ruptcy, but the advertisement not inserted in the Gazette. Prayer by petitioning creditor to supersede, that he might issue an unobjectionable commission. Ordered.

1831.

Ex parte
WISWOLD
and another.
In the matter
of
WISWOLD
and another.

ping. Upon this principle all stage-coach owners would be traders.

Mr. *Montagu*, *contra* :—

It is one of the fundamental rules in the interpretation of statutes, that the enumeration of particulars does not exclude other particulars within the reason of the statute (*a*). The question, therefore, is, whether these persons are buyers and letters within the meaning of the act. That they buy and let is indisputable. Unless, therefore, the words “shall seek their living by buying and letting for hire” are erased from the statute, they are traders within the meaning of the bankrupt laws. And so are coach proprietors.

The VICE-CHANCELLOR.—The act does not mention carriers of any kind, nor does the holding shares in such a vessel constitute such a joint trading as the act contemplated.

Commission superseded.

52 R 8413.
900.2.2h.349

L. C.
April 22,
1831.

The workmen of a coachmaker, who worked by the piece, and received a specific sum for every job, under separate and distinct contracts, and where there is no hiring for a specific time, are not servants within 6 G. 4, c. 16, s. 48.

Ex parte GRELLIER.—In the matter of
MACNEIL.

THIS was an appeal from the decision of his Honour the Vice-Chancellor, reported in *Montagu and Macarthur*, 95.

Mr. *Boteler* and Mr. *Mylne* for the petition :—

The facts of the case are stated in *Montagu and Macarthur*, 95.

(a) *James v. Tutney*, Cro. Car. 532.

1 Mont & B 416
3 Dec & B 116
4 May & B 560.
3 Dec & B 333.

The words of section 48, upon which the question turns, are as follow : — “ When any bankrupt shall have been indebted, at the time of issuing the commission against him, to any servant or clerk of such bankrupt, in respect of the wages or salary of such servant or clerk, it shall be lawful for the commissioners, upon proof thereof, to order as much as shall be so due as aforesaid, not exceeding six months’ wages or salary, to be paid to such servant or clerk out of the estate of such bankrupt, and such servant or clerk shall be at liberty to prove under the commission for any sum exceeding such amount.”

The question arises upon the word “servants” which has been supposed to extend to every person by whom the bankrupt has been served; but this was not the intention of the legislature.

That the word servant, in common parlance, is not used in this extensive sense, is obvious. In saying that A. is B.’s servant, no person would imagine that it meant a weekly labourer : or, in speaking of a printer’s servant, no person would imagine that it meant all the compositors and pressmen in his office engaged at a weekly allowance, but the servants in his house, *intra mœnia*.

The legal understanding of the word servant does not differ from its common acceptation. In 20 Geo. 2, c. 19, the legislature recognizes the difference between servants.

The first section is as follows :—

“ Whereas the laws now in being, for the better regulation of servants, and for the payment of wages to them, and to artificers, handicraftsmen, and labourers, are insufficient and defective : for remedy whereof, be it enacted, that all complaints, differences, and disputes, which shall happen or arise between masters or mistresses and servants of husbandry, who shall be hired for one

1831.

Ex parte
GRELLIER.
In the matter
of
MACNEIL.

1831.

—
Ex parte
 GRELLIER.

In the matter
 of
 MACNEIL.

year or longer, or which shall happen or arise between masters and mistresses and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers employed for any certain time, or in any other manner, shall be heard and determined by one or more justice or justices of the peace," &c.

In *Townshend v. Windham*, 2 *Vernon*, 546, the Duke of Bolton by his will devised in these words; viz. I give and bequeath unto such of my servants as shall be living with me at the time of my death one year's wages.

Lord Keeper:—"Stewards of courts, and such who are not obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will: but I will not narrow it to such servants only that lived in the testator's house, or had diet from him."

In *Chilcot v. Bromley*, 12 *Ves.* 114, a testator left to all his servants 500*l.* each, and 20*l.* for mourning; this was held not to extend to a job-coachman in the service of the testator at the time of his death.

Before the present act passed, it was customary for assignees to make some allowance to domestic servants, from the distress in which they were involved by the unexpected loss of a year's or half a year's wages; but no person ever conceived that such relief should be extended, nor was it extended, to weekly labourers, to whom, unless from their imprudent confidence, only wages for a week or two could be due. Domestic servants, from the nature of their employment, receive wages only at stated intervals; and, being unable immediately to procure a new place, are protected from the probable distress attendant upon their situations, by the immediate payment to them of six months' wages: a protection for which, as in the case of weekly labourers there was no necessity, there is no enactment; as there is in the cases of clerks, whose

situation may, in some respects, resemble the case of domestic servants.

The legislature, therefore, contemplating the common legal acceptation of the word servant, has used it without any supposition that it could be so construed as to produce the monstrous result of absorbing the whole of a bankrupt's estate in payment, to the exclusion of the general creditors, of a numerous class of weekly labourers.

It has, therefore, not used the word "servant" in a general sense, as appears from the use of the word clerks, which, if the word servant were intended to have this general construction, would be wholly useless.

Mr. *Pepys*, *contra* : —

Contended that the legislature did not intend merely menial servant, which appeared by the words of the statute : the word menial not being used, which it would have been, had it been intended to be so limited, but servants in general. A gardener is not a servant *intra mœnia* ; and it will not be contended that when the general word servants is used it does not extend to gardeners.

Travellers, who are never in the house, are within the act, *ex parte Neal*, 1 M. & M. 94. Clerks do not live within the house ; and they, by the express words of the act, are within its provision. The words of the statute cannot, therefore, be so construed as to be confined to menial servants : nor was it the intention of the legislature that the construction should be so confined ; the object being to assist poor dependents reduced by the failure of their employers to sudden poverty.

What reason is there that it should be confined to menial servants, who, instead of being worse off by the bankruptcy of their masters, are generally better off than trade-servants, whose means are more confined ?

1831.

Ex parte
GRELLIER.
In the matter
of
MACNEIL.

1831.

The LORD CHANCELLOR :— Would you say that Mr. *Crashaw* had 3000 servants ?

—
Ex parte
GRELLIER.

In the matter
of
MACNEIL.

Mr. *Pepys* :— The legislature does not look at extreme cases. The question is, Whether the words are of sufficient extent to include workmen ?—persons through whose subordinate agency a man conducts his business : and if they are sufficiently extensive, it is contrary to the established rules in the construction of statutes, “ that neither a statute using general words nor a remedial statute ought to be limited to a particular case,” to limit their operation.

The use of the word clerk in the act is conclusive against the opinion that the number of persons employed is an objection to the extension of the word to the present case. If a banker employ 50 workmen to perform his business under the name of clerks, they expressly enjoy this privilege, however numerous they may be. As to the mode of remuneration being a solution of the difficulty, the answer is easy. The mode of remuneration cannot alter the nature of the engagement : a man is not the less a servant by being paid by the piece. I may employ a farm-servant, and there may be contracts —so much for digging, &c. &c. This is still a contract of service, and the mode of remuneration is of no consequence. Now all that the affidavits amount to is, that the men have been paid according to the work done. The Vice-Chancellor in his judgment cited several instances to the same effect : a ship-builder’s man, for instance, who might be discharged without notice. It cannot be denied that this is in the nature of a continuing contract, not a contract for a specific job, and merely relative to the specific performance of that job. However inconvenient, therefore, the extension of the terms of this act to such services may be, they come within

their scope, and are not excepted. It appears, therefore, from the words of the act, and the probable intention of the legislature, that it ought not to be confined to menial servants, but that it extends to the present case.

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Mr. *Boteler* in reply :—The reasoning on the other side, from the omission of the word menial, is erroneous : as, from the word servant with the use of the word clerk, it cannot be inferred that servant was used in a general sense ; and the particular sense in which it was used appears from the words six months' wages or salary : the word wages applying to servants, salary to clerks. To the observation that the number of workmen is not any reason to be considered in the interpretation of the statute, as, if a banker employ fifty clerks, they, notwithstanding their number, are within the meaning of the act. Mr. *Pepys's* own words are, perhaps, the best answer :—" That the legislature does not look at extreme cases ;" but, with respect to bankers' clerks, it takes the average three or four, and not such an establishment as the Bank of England, in which hundreds of clerks may be employed.

Mr. *Rose* stated that there was another petition upon the same clause in the paper : it was a case of workmen employed in excavating.

The LORD CHANCELLOR :—I certainly have formed an opinion, but will suspend it till I have heard both cases ; and, after having heard the next case (a), his Lordship reversed the judgment of His Honor the Vice-Chancellor.

(a) See *post*, page 270.

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LINC. INN,
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Weekly labour-
ers, and work-
men employed
as excavators
and bricklayers,
for not servants.

ost 278.

on 14/3/16

by 10/5/60.

each 333

Ex parte CRAWFOOT.— In the matter of
STREATHER.

THE petition stated, that the bankrupt, previous to his bankruptcy, carried on business as a builder, and had, some time before his bankruptcy, entered into a contract for constructing a new basin in the London Docks, and was, to the time of the issuing of the commission, engaged in completing such contract, and was also engaged in erecting several new churches and other buildings; and, for the purpose of carrying on such operations, he employed a great number of labourers, who worked for or under him as excavators, bricklayers, carpenters, masons, and in performing other work: That many of such labourers and workmen had, at the time of the bankruptcy, money due to them for their labour and work: That such labourers usually worked in gangs, with a foreman to each gang; and the foreman of each gang usually received the wages for the whole of the labourers composing the gang, and paid them their respective amounts or proportions thereof; and the labourers in each gang were usually hired and engaged by the foreman of each gang; and such labourers were not hired for any definite times, but worked, or left off such work, when they thought fit so to do: That such labourers were to be and were paid, according to the time they respectively worked, at a certain rate per day, the day being considered as twelve hours, and being calculated from six o'clock in the morning to six o'clock in the evening; and if any of such labourers worked a greater or less number of hours, they were paid proportionably, more or less, so as sometimes to receive wages at the end of the week as for seven or eight days' labour, and so as sometimes to receive wages only as for two or three days' labour.

The petition then stated that the commissioners had decided that all such labourers were within the provision of 6 Geo. 4, c. 16, s. 48; and that the total amount due from the said bankrupt to all his labourers and other workmen for their labour is, as petitioners believe, 1200*l.* or thereabouts; and if said decision of commissioners be supported and acted upon, all of such labourers and workmen will, as your petitioners are advised, be entitled to be paid in full; and the whole or nearly the whole of the assets of the said bankrupt will be exhausted thereby.

The petition then prayed that the decision of the commissioners might be reversed.

Mr *Pepys* and Mr. *Jacob* for the petition: —

The LORD CHANCELLOR called upon the respondent, for whom Mr. *Rose* and Mr. *Blunt* appeared.

This differs from the case of *ex parte Grellier*, (*ante*, 269,) which related to workmen by the piece, without any continued hiring, at weekly wages. The labourers, whose case is now before the Court, are the very trade servants to whom this law is applicable; the persons described in the statute being “wharfingers, builders, carpenters,” &c.; and it cannot be supposed that, in this commercial law, it was the intention of the legislature, that the domestics of the trader’s establishment should be protected, and their trade servants neglected.

It is a rule in the construction of statutes, that “general words are not, without reason, to be confined to particular cases.” As the word “servant” is general, the question is, whether there is sufficient reason to limit its operation to menial servants, when the word menial, which might have been used, has not been used.

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If the act is to be held not to extend to persons of the class mentioned in the petition, it must be, either because the word “*servant*,” in its usual legal meaning, does not include such persons, or because there are other words in the act restraining the ordinary meaning of the word servant. If there is any thing in the facts of the case to exclude these persons (who were clearly *serving* the bankrupt) from within the usual meaning of the word servant, it must arise, either from the mode of hiring, or from the nature of their employment.

Now the word *servant* is applied to persons in the service of another, without reference to the nature or duration of the hiring. Thus a person at will is, in pleading, called a servant, *Vin Abr. Master and Servant*, T. 16. “In trespass for taking his servant out of possession, the count nor the writ do not make mention of any retainer, but *quod J. N. servientem suum in servicio suo existentem cepit et abduxit*, for he *may be a servant at will*.” But with a view to shew that the word servant is applicable without reference to the mode of hiring, or to the nature of the service, the most material is the Embezzlement Act: the words of that act are, “that if any servant or clerk, or any person employed for the purpose, in the capacity of servant or clerk to any person, &c. shall, &c.” These words are not distinguishable from those used in the Bankrupt Act. The word servant has been held, in the Embezzlement Act, to include persons of a much less extensive hiring than the persons named in the petition, and persons the nature of whose service was much less defined. *Rose v. Smith*, R. & R. 516; *Hartley’s Case*, *ib.* 139; *Spencer’s Case*, *ib.* 299. If, in the construction of a penal act, where the leaning of the courts would be to construe the words most strictly in favour of the persons who contended they were not within the meaning of the word “servant,” it has still

been held that such persons are within the description intended by the legislature under the word servant, surely, in the act under consideration, where the leaning, if any, must be to extend the meaning of the word, it must be determined to include the persons seeking, in this case, to come within the scope of the act. There is nothing, therefore, in the mode of hiring or service, in this case, to exclude these persons from being within the scope of the words of the act; neither is there any thing in the words of the act itself. It has been said that the words of the clause, by contemplating an arrear of six months' wages, shew that a hiring by the week was not intended, but that yearly servants only were intended. This is a forced construction, and cannot have been the intention of the legislature, for if it were, the act would, except in London, be nearly a dead letter; for it is well known that now, to avoid the law of settlement, yearly hirings are in most parts nearly out of use.

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It is contended that the act was intended to apply to domestic servants only: if so, why do we not find the word *domestic* in the act? The word servant stands alone, and ought not to be cut down in its meaning, unless by express words in the act itself.

But suppose it be admitted, to go out of the act to ascertain what was the intention of the legislature: still we say all the reasoning which can be used to discover the object of the clause is in our favour; for if we consider it, either as regards the persons intended, or as regards the estate of the bankrupt, in either view the result will be on our side.

First, as regards the persons: *Domestic servants* are always fed, and, in most cases, clothed by their masters. Whereas, on the other hand, labourers and handicraftsmen, besides being for the most part burdened with families, which domestic servants seldom are, are forced to live from day to day upon their wages: in anti-

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cipation of their wages, they necessarily contract debts for their food, clothing, and lodging; and if, at the end of the usual time of payment, they do not receive their pay, they are left without the means of subsistence, and must necessarily, as has happened in this case, go upon the parish.

Secondly, as respects the estate of the bankrupt, the difference between productive and unproductive workmen is to be noted. Labourers, artificers, and handicraftsmen, are of the former description; domestic and menial servants are of the latter. By the employment of the latter, the estate of the bankrupt is diminished and expended; by the work of the former the estate is improved and increased. As respects the estate, therefore, the labourer, artificer, and handicraftsman have a high claim to a preference: the menial and domestic servant can have no claim whatever. Besides, sound policy, with a view to the interest of the estate, demands that the productive labourer should be certain of his wages; if he be so, he will work up to the last moment, and, by the application of his labour, go on increasing the value of the estate until the very period of bankruptcy takes place; whereas, on the other hand, if not secure of his wages, he will, upon every rumour or apprehension of failure, strike work, and thereby, in many instances, materially injure the value of the estate.

The reasoning, therefore, out of the act, is clearly in favour of our view of the case, both on the ground of justice and good policy as regards the estate of the bankrupt, and of humanity as respects the persons employed.

LORD CHANCELLOR:—The case is too clear for me to trouble the petitioners to reply. I had not any doubt yesterday; and the opinion which I yesterday entertained is not shaken to-day. The words of the act are: “when any bankrupt shall have been indebted to any

servant or clerk, in respect of the wages or salary of such servant or clerk." In strict etymology the distinction between servant and workman is, that servant does any thing, and workman particular work, and it certainly is true that, in former times, the word *servant* was used in a general sense; as in 5th Eliz. : but as society advanced, the varieties of service increased, and the word has been used in a more limited sense. This appears, amongst other statutes, by 20 Geo. 2, c. 19, where the distinction is made: "servants of husbandry, and artificers, handicraftsmen, miners, colliers, and other labourers." That in the present act the legislature did not intend that servant should be used in this general sense appears from the word clerks, which would have been surplusage; and from the terms of remuneration, "of six months' wages and salary;" terms which cannot, with any propriety, be applied to workmen, who are paid daily or weekly, and who, instead of six months' wages, would ask for their six days' pay; and from the omission of the word "workmen," which, if it had been intended that they should be included, would have been used in the same manner as clerks.

The words themselves, therefore, appear to me to be sufficient to explain the intention of the act; but when the nature of the recognized evil, before the enactment, is considered, and when it is remembered that this provision was borrowed from the Scotch act, and when the monstrous consequences which must result from expending such a large sum amongst a particular class of creditors is considered, I am satisfied that the intention of the legislature would be defeated by this extensive construction.

This petition must, therefore, be dismissed, and the prayer of *ex parte Grellier* be granted.

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Where a second commission issued against a person who had previous to the first commission compounded, the Lord Chancellor refused to supersede the second, because 15s. in the pound had not been paid under the first.

Ex parte WELSH and another.—In the matter of MERRYWEATHER.

THE petition stated that, in 1822, *Merryweather* compounded with his creditors.

That in 1826 a commission of bankrupt issued against him, under which the petitioners were assignees, and under which 15s. had not been paid.

That in 1830 the present commission issued. It prayed a supersedeas.

Mr. *Pepys* and Mr. *Montagu* for the petitioner:—

By section 127 of the bankrupt act, it is enacted, “That if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission 15s. in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools and necessary household furniture, and the wearing apparel of himself, his wife and children,) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing of such commission.” Upon this clause it has been decided, in *ex parte Lane*, 1 *Mont.* 12; and *Fowler v. Coster*, 10 *Barn & Cres*, 430; confirmed by *Phillips v. Hopwood*, 1 *B. & Ad.* 619, that the present commission is void at law. In *Fowler v. Coster* the judges refer to all the previous authorities upon the subject.

2 *Mont. & Ad.* 260-368-431.

3 — 297-418.

2 *Deace* 500

3 — 61

Mon 1 & 2 430.
Deace 375.
Deace 7.
P. Sine 249.
P. Biny 316.

Lord *Tenterden* saying, “ In the same case [*Martin v. O’Hara*, *Cowp.* 823.] Mr. Justice *Buller* said, ‘ I take it to be perfectly clear, that a second commission cannot be taken out against an uncertificated bankrupt ; and for this reason, it would be entirely idle and nugatory, because all his effects belong to his assignees under the first.’

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“ The opinions,” continues Lord *Tenterden*, “ which have been given in other cases against the validity at law of such a commission are numerous, and of the highest authority. Lord *Hardwicke*, in the case of *ex parte Proudfoot* (a); Lord *Roslyn*, in *ex parte Brown* (b); Lord *Eldon*, in several subsequent cases (c), have all stated that a second commission, before a certificate was obtained under the first, was void at law. Lord *Thurlow* appears to have been of a different opinion, *ex parte Hollingworth* (d); and Lord Chief Baron *Thompson* and the Court of Exchequer, in a recent case, *Butts v. Bilke* and another (e), desired the question to be stated in a special verdict; but this Court, in the late case of *Till v. Wilson* (f), upon a consideration of all the cases, decided that a second commission was absolutely void at law.

“ We see no reason to depart from that decision; and we consider that, by the authorities above referred to, it is fully settled that the Lord Chancellor has no power, under the bankrupt statutes, to issue a commission for the purpose of distributing effects which are already vested in assignees under a prior commission, and that such commission is not merely nugatory, but void.”

(a) 1 *Atk.* 253.

(b) 2 *Ves.* jun. 67.

(c) 15 *Ves.* 114; 15 *Ves.* 543; 16 *Ves.* 236. 473; 1 *Rose*, 136. 285; 2 *Rose*, 139. 172.

(d) *Co. B. L.* 9.

(e) 4 *Price*, 240.

(f) 7 *Barn. & Cres.* 684.

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The very same expression is used by Lord *Tenterden* in *Phillips v. Horwood*, 1 *Barn. & Ad.* 621; in which his Lordship says, “The ground of the decision in *Till v. Wilson* (a), and in *Fowler v. Coster* (b), was, not that the bankrupt could not trade, but that the Lord Chancellor had no authority to issue a subsequent commission while the effects were still vested in the assignees under a former one.”

As the commission is void at law, the order is of course.

Mr. *Rose* for the respondents:—

The decision in the Court of King’s Bench, of which it is supposed, in the profession, that one of the Judges entertained great doubt, is now so recent, that it can scarcely be assumed as settled law. The principle upon which it is decided is, that the commission is invalid because there is not any property upon which it can operate, a supposition, which, if correct, would annihilate the greater part of existing commissions, and which was always doubted by Lord *Thurlow*, *ex parte Hollingsworth*, *Cooke*, 10. As there may be a surplus, or the assignees under the prior commission may have so suffered their bankrupt to have acted as to be reputed owner of property: and because there may be other requisites than the possession of property to render it necessary that a commission should issue against a person with whom, after a known act of bankruptcy, there can be no valid dealings.

The dictum, therefore, of the Court of King’s Bench, that the Lord Chancellor has not authority to issue such commission, (if the words were used by the Court in

(a) 5 *Barn. & Cres.* 684.

(b) *Ante* 270.

the strong sense stated by the reporter,) is mistaken law. (a)

Mr. *Pepys* in reply :—

It certainly is possible, that a man, now a pauper, may, by a prize in the lottery, or any of the various chances attendant upon the fluctuation of property, to-morrow be opulent; but such a possibility has never been considered property to support a commission.

In *Moth v. Freme*, *Amb.* 396 ; and *Carleton v. Leighton*, 3 *Merr.* 671 ; it was decided that the expectancy of an heir at law is not a possibility within the bankrupt laws: and, as to the reputation of ownership, which is not, in fact, pretended, in this case, it cannot in law exist against assignees under a commission of bankrupt ; but the subsequent creditors, if they can establish an equitable priority, may substantiate their right, as in *Troughton v. Gitley*, *Amb.* 630. The observation, therefore, of the Court of King's Bench, that the Lord Chancellor has not authority to issue a third commission, is well founded. *Cur. adv. vult.*

LORD CHANCELLOR :—The result of my consideration of the act of parliament and the cases, and particularly of the cases at law, is, that I cannot adopt the opinion (I say it with great respect to the learned Judges)—I cannot adopt their *obiter dicta* in those cases. I cannot bring my mind to say that the great seal has not the power to issue a third commission in these cases, when I do not find that the power is limited or taken away by the act of parliament. As regards the

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(a) It is a fact, which ought to be known, that, in the case of *Fowler*, the bankrupt had insured his life to an amount sufficient to pay all his debts, and died after the third commission was superseded.

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question before the Court of King's Bench, it is clear that the Courts were right; namely, that the property was divested by the commission, and the continuing the investment of that property in the assignees. Every thing beyond that was *obiter dicta*—was beyond what the Court was called upon to decide. Whether or not the great seal could issue a third commission was not a question before them. As it is clear that cases might exist in which the debtor may have property to be divided under a third commission; as, for instance, there may be a reversion, and which falling in, the whole of the debts under the second commission may be paid; and as there would be assets with a surplus, the third commission might operate. I cannot concur in the view which their Lordships have taken.

Mr. *Rose* :—The result will be, that the petition is dismissed with costs.

LORD CHANCELLOR :—I cannot give costs against the decision of the King's Bench.

In consequence of this apparent conflict of opinion, I subjoin a note upon the question, whether a commission against an uncertificated bankrupt is void at law. (a)

(a) This note is divided into three parts: 1st, The decisions by which this law is established; 2dly, Dicta upon the subject; 3dly, Examination of the principle of these decisions. 1st, *The decisions by which the law is established. Ex parte Cooke*, 1728, 2 P. Wms. 500. A joint com- mission issued against a firm of two, and afterwards, two separate commissions: Upon a petition by the assignees under the separate commissions to sue at law for the separate estates, Lord Chancellor :—It seems to me that the assignment under the joint commission passes as

Ex parte NORCOTT.

post 4 ff.

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Sept. 10,
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MR. *Ayrton* applied for an order to supersede, with consent of all the creditors, which had been refused at the office upon, the ground that the bankrupt did not surrender on the 42nd day. He stated, that the bank-

If a bankrupt is unable, in consequence of illness, to attend an adjourned third meeting, and the commissioners, therefore, adjourn the meeting: the Court will, upon consent of all the creditors, supersede without another surrender.

well the separate as the joint estate, consequently the assignees in the separate commissions can make nothing of their action at law, and I will not suffer them to spend and waste the estate in vexatious suits there; but if they will join in a bill in equity for an account of the separate estate, I will not hinder them. In *re Simpson*, 1752, 1 *Atk.* 137, where a commission issued against the surviving member of a firm pending a valid joint commission, the Lord Chancellor ordered the separate commission to be superseded, saying, Formerly, where there were several partners, they used to take out separate commissions against each partner, as well as a joint commission. This practice being of late thought a very unreasonable one, as occasioning great confusion with regard to bankrupts' effects, has been discontinued. *Ex parte Manton*, 1812, 1 *V. & B.* 60. Lord Chancellor:—I always felt great difficulty in understanding the principle upon which, for a long time, a joint commission and a separate commission were permitted to go on together. My

opinion has always been, that if the joint commission was the first, the separate commission was in law good for nothing; and if the separate commission was the first, the joint commission was bad. Unless, therefore, it was by the effect of amicable arrangement, to which the debtors both joint and separate lent themselves, it is very difficult to conceive how any person could effectually proceed at law under the second commission either for civil or criminal purposes. But see *ex parte Burrell*, 1783, *Cooke*, 532, from which it appears that in the year 1783 a joint and separate commission subsisted at the same time. *Butts* and others, assignees of *Geddes* and *Milliken*, and *G. Geddes*, plaintiffs, against *Bilke*, sheriff of Surrey, and *Havelock*, defendants, tried at Kingston Lent Azzizes, 1813. 1 *Montagu* on Partnership, 220. In an action brought by the assignees under two separate commissions, issued against two of three partners jointly with the third partner, to recover damages for the conversion of a ship, which had been taken in execution after the

2 Decr 46 95
1 Mont 220 34
458-718
1 Mont 220 34
4 Decr 46 35

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rupt was prevented by a very severe illness, of which the commissioners were satisfied by the certificates of a physician and surgeon, and had certified accordingly; and

commission of acts of bankruptcy by the two bankrupt partners, (in an action in which the partner plaintiff had been outlawed,) the defendants put in evidence a joint commission against the three partners, issued subsequently to the separate commissions, and contended that such joint commission was valid, and had passed the interest of the partner plaintiff, and therefore that he could not maintain the action. The plaintiffs insisted that during the existence of the two separate prior commissions the joint commission was a nullity; but the learned Judge who tried the cause (*L. C. B. Thomson*) nonsuited the plaintiff. The court was afterwards moved to set aside the nonsuit and to grant a new trial, and the rule was made absolute. *S. C. 2 Rose*, 171. *Ex parte Cridland*, 1814. 3 *V. & B.* 102. In this case the counsel in argument said, In the course of the last term the Court of Exchequer determined this point as between a joint after a separate commission in England, granting a new trial, against the opinion of the Lord Chief Baron. The Lord Chancellor says, With regard to the present state of this subject in the Court of Exchequer, though it has gone to a new trial, it may

come back in a shape that may produce this very question; and it is no inconsiderable drawback upon the opinion I have entertained against the validity of the second of two English commissions, that the Lord Chief Baron, looking to Lord *Hardwicke's* opinion, and unable to account for his practice, thought that both commissions might stand. 2dly, *Dicta upon the subject*. D. Lord Chancellor. *Ex parte Martin*, 1808, 15 *Ves.* 115. This does not resemble the ordinary case of a joint and separate commission; which formerly were permitted to stand together, at the hazard of all inconvenience that might arise with reference to legal questions; but that course is altered; and now, if the joint commission can be sustained, it stands. In *ex parte Rhodes*, 1809, 15 *Ves.* 530, the Lord Chancellor says, In Lord *Hardwicke's* time, two commissions were frequently permitted to proceed together: a separate after a joint commission; yet it is clear in law that the separate commission was bad. *Ex parte Crow*, 1809, 16 *Ves.* 237. Petition by an uncertificated bankrupt to supersede a second commission which had been issued against him. In the course of the judg-

that a similar order had been made in *ex parte Glynn*, 1 Mont. 124, and in a case subsequent to that, which had not yet been reported.

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ment, the Lord Chancellor said, If a joint commission issues against two persons, one of whom has been declared a bankrupt under a separate commission against him, the joint commission is a nullity; one of the parties being already a bankrupt under a prior commission. So, a joint commission subsisting, a subsequent separate commission against one of these bankrupts is a nullity. We are now in the habit of making an arrangement, superseding the one or the other, as may best answer the ends of justice; but, in Lord *Hardwicke's* time, both the joint and separate commissions stood together; and, that being permitted, the necessity was felt of giving the bankrupt, by arrangement, the benefit of a certificate, to be signed by some creditors of a class who, strictly speaking, could not come in. D. Lord Chancellor. *Ex parte Lees*, 1809, 16 Ves. 476. I could never conceive how Lord *Hardwicke* could, as he did in fact, support both a joint and a separate commission, if the mere fact that a second commission is void at law furnished the guide of his practice. We have now a mode of arrangement attended with less oppression and expense. In *ex parte Mason*, 1813, 1 Rose,

426, the Lord Chancellor: — Although, strictly speaking, a second commission, where a first commission has issued and is in prosecution against the same person, is void at law, yet it has been the daily practice of this court, long before I came into it, if it could be done with justice to creditors and purchasers, and those who had been concerned with the first commission, to give effect to the second by arrangement here; and the difficulty in this case has arisen more from the circumstance of so much having been done under the first commission, than from its validity at law. Lord *Hardwicke* contrived to sustain joint and separate commissions at the same time; and in that respect it may be said that he went a great deal too far, unless he was prepared to go further, and to prevent, by the arrangement of orders and injunctions, the mischief that might result from their conflicting operations. After I came into this court a different practice was introduced. 3dly, *Examination of the principle of these decisions*. These decisions stand upon the ground, that a commission which issues against an uncertificated bankrupt is void at law. Upon this subject there are two ques-

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The certificate was as follows :—

“ In the matter of *William Norcott*, a bankrupt, to the Lord High Chancellor of Great Britain :

“ We, whose names, &c. humbly certify to your Lordship, that the said *William Norcott* being so declared

tions; 1st, Has it been solemnly determined that a commission issued against an uncertificated bankrupt is void at law? 2dly, If it has been determined that a commission issued against an uncertificated bankrupt is void at law, upon what principle are the decisions founded? 1st, Has it been solemnly determined, that a commission issued against an uncertificated bankrupt is void at law? The first case upon this subject is *ex parte Proudfoot*, 1743, 1 *Atk.* 252. This was a petition presented in 1743, by two creditors, under a commission which had issued in 1732, to supersede a commission which had issued against the same bankrupt in 1736, upon the ground that he had not obtained his certificate under the commission of 1732. Lord *Hardwicke* says, I am of opinion, that if this case had stood clear of the agreement, the second would have issued irregularly, and I should without scruple have set it aside, and the certificate likewise; because when assignees are chosen under a first commission, all the estate and effects of the bankrupt are vested in them, and he is incapable of carrying on any trade, and all his

future personal estate is affected by the assignment, and every new acquisition will vest in the assignees; but, as to future real estates, there must be a new bargain and sale. The bankrupt is incapable of acting, and therefore no second commission can be taken out before he has his certificate under the first, for till then nothing can pass under the second, at least of personal estate, consequently the certificate here (that is under the second commission) can have no operation at all, and I am of opinion it would have been void at law. There may have been instances where second commissions have been taken out, when former commissions have been deserted, and the assignees, perhaps, and the commissioners, dead; and this innocently, and may have passed *sub silentio*; but it is by no means a rule to govern the court. But, under the circumstances of this case, I am of opinion, that I cannot set aside the second commission, because it would be a great prejudice and injustice to those persons who have given the bankrupt credit ever since his certificate was confirmed, which was no less than two years

bankrupt, the major part of the said commissioners, by the said commission authorized, did cause due notice to be given and published in the London Gazette of such

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and three quarters ago. Upon the whole, after all that has been transacted between the assignees under the first and the creditors under the second commission, in relation to the certificate, and after the bankrupt has been once more enabled to trade, and gained a new credit, by my confirming his certificate, I should do very wrong if I set aside the second commission under all these circumstances, and therefore the petition must be dismissed. — With respect to this case, *ex parte Proudfoot*, it must be remembered that Lord *Hardwicke*, notwithstanding these dicta, did not supersede the second commission; and upon examining the reports of other decisions by Lord *Hardwicke*, it may, perhaps, be inferred, that although he considered the contemporaneous existence of two commissions against the same uncertificated bankrupt to be attended with inconvenience and unnecessary expense, he did not regard the second commission as void. In *ex parte Cooke*, 1728, 2 *P. Wms.* 500. where arises this question, that the simultaneous existence of two commissions may be attended with unnecessary expence—his words are, “The assignees of the separate commissions can make

nothing of their action at law, and I will not suffer them to spend and waste the estate in vexatious suits there: but if they will join in a bill in equity for an account of the separate estate, I will not hinder them. The next case is, in *re Simpson*, 1752, 1 *Atk.* 137, in which he says, Formerly where there were several partners, they used to take out separate commissions against each partner, as well as a joint commission. This practice being of late thought a very unreasonable one, as occasioning great confusion with regard to bankrupts’ effects, has been discontinued. In *ex parte Rhodes*, 1809, 15 *Ves.* 539, Lord *Eldon* says, In Lord *Hardwicke*’s time he frequently permitted the commissions to proceed together, a separate after a joint commission, yet it is clear in law that the separate commission was bad. In *ex parte Crow*, 1809, 16 *Ves.* 237, Lord *Eldon* says, In Lord *Hardwicke*’s time both the joint and separate commissions stood together, and, that being permitted, the necessity was felt of giving the bankrupt, by arrangement, the benefit of a certificate, &c. In *ex parte Munton*, 1812, 1 *V. & Beames*, 60, Lord *Eldon* says, I always felt

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commission being issued, and of the times and places of three several meetings of the said commissioners, by the said commission authorized. The first of which meetings

great difficulty in understanding the principle upon which, for a long time, a joint commission and a separate commission were permitted to go on together. My opinion always was, that the last commission was not good. The next case is, *Martin v. O'Hara*, 1778, *Cowp.* 823. Rule to shew cause why an exoneretur should not be entered upon the bail-piece, the defendant having obtained his certificate under a second commission, he being uncertificated under a first commission. Lord *Mansfield* : — Here it is clear that the bankrupt himself would not have been entitled to his discharge if surrendered; and the bail can never be in a better situation than the principal. An uncertificated bankrupt is incapable of trading or contracting for his own benefit. All the property he acquires belongs to his creditors. If he cannot trade for himself, he cannot be the object of a second commission. *Buller J.* : — I take it to be perfectly clear that a second commission cannot be taken out against an uncertificated bankrupt; and for this reason, — it would be entirely nugatory, because all his effects belong to his creditors under the first; and I take this to have been determined

in the case of a lighterman, where the assignees under the first commission recovered a lighter, built by the bankrupt (being uncertificated) after a second commission sued out. Rule discharged. This case of *Martin v. O'Hara* is the only case at law which I can find upon this subject; it is a decision upon motion to the equitable jurisdiction of the court in a case of gross fraud, when it is manifest that the court would be averse from any avoidable interposition. The following is the whole of Lord *Mansfield's* judgment. Lord *Mansfield* : — This is an application to the equitable jurisdiction of this court. Formerly the method was, for the bail to surrender the defendant, and then for him to apply to be discharged upon an affidavit, stating the fact of his having become bankrupt since the cause of action arose, and obtained a certificate of his conformity to the commission. But of late, where a bankrupt is clearly entitled to his discharge, the court, to avoid circuitry, have ordered an exoneretur to be entered on the bail-piece, without the form of a regular surrender of the bankrupt by his bail. Here it is clear that the bankrupt himself would not have been entitled to his dis-

was appointed for the 22nd day of June 1830; the second for the 29th day of the same month; and the third for the 27th day of July following. And we further

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charge, if surrendered: and the bail can never be in a better situation than the principal. An uncertificated bankrupt is incapable of trading or contracting for his own benefit. All the property he acquires belongs to his creditors. If he cannot trade for himself, he cannot be the object of a second commission. 2. The proceedings in this case under the last commission are manifestly a gross fraud and contrivance on the face of them. The defendant, a linen-draper in London, after being a bankrupt there, goes to Bristol, changes his trade, and enters into partnership with a cheesemonger, and, within six months after, breaks again. A second commission is taken out, not in London, where his former creditors would have heard of it, but at Bristol, where it might be conducted without their knowledge; and under this commission he obtains his certificate. The whole proceeding is a gross fraud. Even supposing the creditors under the first commission had been informed of this, and had been inclined to prove their debts under it, they could not have done so. Therefore discharge the rule.—The following cases were decided by Lord Eldon. *Ex parte Rhodes*, 1809, 15 Ves.

539. Petition by a bankrupt to supersede a commission which had been issued against him in October 1808, by a creditor who had notice that he was an uncertificated bankrupt under a commission that had issued against him in 1789. Lord Chancellor:—As to the other ground for superseding the commission, I can do no more than direct notice to be given to the assignees under the former commission; and that they shall inform me whether they mean to claim the effects or not; as, if they do, this commission must be superseded. Sir S. Romilly, for the bankrupt, observed, that notwithstanding the case of *Troughton v. Gilley*, it was never decided, where there was a first commission, and, after a distance of time, no certificate having been obtained, a second commission issued, that, merely as the assignees under the first did not claim the property, therefore the second should stand; and it is extremely important to the bankrupt to be the object of two concurrent commissions; for instance, with reference to the certificate. Lord Chancellor:—The difficulty is this: the first commission subsisting, of whatever date, the second is clearly bad. Cases have however

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humbly certify to your Lordship, that the major part of the commissioners met on the 22nd day of June 1830, pursuant to notice given and published in the London

occurred, where, an old commission subsisting, and the bankrupt having gone again into trade, a new commission issued, which he attempted to supersede: and it was held, that if the persons claiming beneficially under the old commission did not mean to interfere with the effects under the latter commission, the court would not interpose; yet then this difficulty remained, that the first commission might be set up as a bar to an action under the second. The court however has refused to interfere in that case; and has, in Lord Hardwicke's time, frequently permitted two commissions to proceed together; a separate after a joint commission: yet it is clear in law that the separate commission was bad. Many important observations arise against what the court did in the case of *Troughton v. Gitley*. The next case which I find is, *ex parte Crow*, 1809, 16 *Ves.* 237. Petition by the bankrupt to supersede a second commission which had issued against him, he being uncertificated under the first. Lord Chancellor:—In law, the second commission is good for nothing. The assignee cannot bring an action or protect himself under it; in short, the second commission cannot have any

operation except under direction of arrangement here. The petition was ordered to be served upon the assignees under the first, and the petitioning creditor under the second commission. These cases, which were decided by Lord Eldon, are founded, either, 1st, Upon the precedents of *ex parte Proudfoot*, 1 *Atk.* 252, and *Martin v. O'Hara*, *Cowp.* 823; or, 2ndly, Upon principle. Then see *ex parte Degraes*, March 28, 1810, MSS. *ex parte Lees*, 1810, 16 *Ves.* 476. 2ndly, As to the principle:—Supposing it to have been decided that the second commission is void at law. These decisions must stand upon the ground that a commission is illegal under which, 1st, There is not any property to be seized for the benefit of the creditors; or, 2ndly, Under which there cannot be any property to be seized for the benefit of the creditors. Does the non-existence of property to be seized under the commission make the commission void at law? The bare fact of there not being any property to be seized under the commission cannot in itself make a commission void, as the creditors are entitled, not only to property in possession, but to possibilities, and to any property of

Gazette as aforesaid, to receive the proofs of debts under the said commission ; and again met on the said 29th day of June following, pursuant to such notice, for the

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which he may become possessed before his certificate is allowed by the Lord Chancellor. *sdly*, Is the second commission void at law because there cannot be any property to be seized under it? The following are dicta upon this point:—In *ex parte Cook*, 1728, 2 *P. Wms.* 500, the Lord Chancellor says, It seems to me that the assignment under the joint commission passes as well the separate as the joint estate, consequently the assignees on the separate commissions can make nothing of their action at law. In *ex parte Proudfoot*, 1743, 1 *Atk.* 252, Lord Hardwicke says, When assignees are chosen under a first commission, all the estate and effects of the bankrupt are vested in them, and he is incapable of carrying on any trade, and all his future personal estate is affected by the assignment, and every new acquisition will vest in the assignees; as to future real estates, there must be a new bargain and sale. The bankrupt is incapable of acting, and therefore no second commission can be taken out against him before he has his certificate under the first, for till then nothing can pass under the second, at least of personal estate, consequently the certificate under the

second commission can have no operation at all. In *Martin v. O'Hara*, 1778, *Cowp.* 823, Lord Mansfield says, An uncertificated bankrupt is incapable of trading or contracting for his own benefit. All the property he acquires belongs to his creditors. If he cannot trade for himself, he cannot be the object of a second commission:—and *Buller, J.*, says, A second commission cannot be taken out, and for this reason, it would be entirely idle and nugatory, because all his effects belong to his creditors under the first. As the law upon this subject may, perhaps, be considered as not finally settled, I subjoin the following observation:—1st, It seems difficult to conceive the existence of any commission under which there may not, by possibility, be property to be distributed. *Ex parte Hollingsworth*, 22d December 1791, *Cooke*, 10. Since the determinations as to the invalidity of a second commission against an uncertificated bankrupt, considerable doubt upon the point was suggested by Lord Thurlow, founded upon the possibility of the bankrupt's property being more than sufficient to satisfy the creditors under the first commission twenty shillings in the

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proof of debts under the said commission, and for the choice of assignees; on which last-mentioned day the said *William Norcott* did surrender himself to the said

pound. D. Lord Chancellor, *ex parte Lees*, 1809, 16 *Ves.* 474. The decisions, that a bankrupt uncertificated has no property, and that he may acquire property by action, are not to be reconciled; both are, however, settled points which cannot be disturbed. 2ndly, If the second commission is void at law, it seems that it must have been void when it issued, and that it cannot be made valid by superseding the first commission. In *ex parte Lees*, April 18, 1810, 16 *Ves.* 476, D. Lord Chancellor, Although the superseding the first commission cannot make the second, which is a void commission, valid, it will have the same effect, as it will deprive the creditor of the evidence of the existence of the first commission. In *ex parte Thompson*, 1812, *Rose* 285, Lord Chancellor says, This court will interfere to prevent the production of a first commission at law, if the circumstances require it. 3dly, If the second commission be for all purposes void at law, it should seem that the bankrupt may invalidate it by law; but there is no case at law to this effect, and, unless under peculiar circumstances, the Lord Chancellor has declined to supersede a second commission upon the petition of the bankrupt. In *ex parte Rhodes*, 1809, 15 *Ves.* 539, upon an application by a bankrupt to supersede a second commission which had issued against him, although uncertificated under the first commission, the Chancellor says, I can do no more than direct notice to be given to the assignees under the former commission, and that they shall inform me whether they mean to claim the effects or not; as if they do this commission must be superseded. Sir *S. Romilly* said, It was never decided that, merely as the assignee under the first did not claim the property, therefore the second should stand; and it is extremely important to the bankrupt to be the object of two commissions; for instance, with reference to his certificate." In *ex parte Lees*, 1809, 16 *Ves.* 474, the Lord Chancellor refused to supersede upon the petition of the bankrupt, saying, that there are cases in which the bankrupt might supersede, and it has been said correctly, that, though the second commission is void at law, the court does not therefore supersede the commission; that it has frequently refused admitting the commission to be void at law, the party standing in circumstances under which he could

commission, and did subscribe such surrender, and did submit himself to be from time to time examined touching the discovery of his estate and effects; and they also met on the said 27th day of July following, to receive the proof of debts, and to take the examination of the said *William Norcott*, on which day the said *William Norcott* was, from severe illness, unable to attend, when the said examination of the said bankrupt was adjourned to the 31st day of August following, and from the said 31st day of August to the 22d day of October following, and from the said 22d day of October to the 12th day of November following, and from that day to the 3d day of December following, on each of which days of adjournment the said *William Norcott* attended before the major part of the said commissioners, and submitted himself to be examined touching the discovery and disclosure of his estate and effects; and on which said 3d day of December the examination of the said bankrupt was adjourned *sine die*.

“ In witness, &c.

“ *Nathaniel Ellison,*

“ *Henry Revell Reynolds junr.*

“ *Basil Montagu.*”

Order made.

not be heard for that purpose. 4thly, In an action where it is necessary to prove the validity of the commission, it has never been deemed necessary to prove that there is property to be distributed under the commission.

5thly, It seems from the constant practice in the courts of common law, that in any action where the validity of the commission is dis-

puted, and the trading, petitioning creditor's debt, and act of bankruptcy are satisfactorily proved, evidence of the non-existence of property could not be adduced to defeat the commission.

In *Nelson v. Chanell*, 7 Bing. 663, the doctrine in *Tyler and Wilson*, and *Fowler and Coster*, is confirmed.

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1 In on 1 & 2 7.

Ex parte MAYOR.(a)

An ante-nuptial settlement may be an act of bankruptcy.

THIS was a petition by trustees under the bankrupt's marriage settlement, dated 1st December 1813, praying that the assignees might be ordered to deliver over to them, upon the trusts of the settlement certain effects which they had seized. The affidavits in answer stated, that from January 1813 the bankrupt was insolvent; that he had been so distressed as to have been in the habit of giving the several workmen employed by him his acceptances, in payment of the wages due to them, which acceptances were often dishonoured; and that checks upon his bankers for payment of wages were also frequently refused payment; that during the year 1813 there were twenty-two bailable actions against him for the recovery of debts amounting to about 2,230*l.*, and that the separate amount of nine of the said actions were under 50*l.*; that in January 1814 there were about seventy actions at law against the bankrupt, for the recovery of debts chiefly upon dishonoured acceptances, to the amount of 11,000*l.*; that twenty-nine of the actions were for debts not exceeding 50*l.*, and that the plaintiffs were delayed in nearly the whole of the actions by dilatory pleadings and defences for time. The affidavits further stated, that the bankrupt's wife had, for many years before her marriage, lived with the bankrupt, and had a child by him.

On the part of the assignees it was contended, that the settlement was a fraud; that a conveyance, although made for a valuable consideration, might be fraudulent, if made to defeat creditors: that this was obvious, by considering that, unless this was law, a trader might,

(a) This case, from the frequent occurrence of analogous questions, is inserted.

with intent to defeat his creditors, convert the whole of his tangible property into money, and quit the kingdom, or he might marry an abandoned woman, for the sole purpose of settling his creditor's property upon her, and then setting them at defiance. In *Dewer v. Baynton*, 6 *East*, 267, the Court said, "A conveyance, though made for a valuable consideration, may be fraudulent in law if made to defeat creditors: the value of the property withdrawn, and the tangibility of the substitute, are important considerations."

For the petitioners it was contended, that a settlement, in consideration of marriage, could never be fraudulent; and *Campion v. Cotton*, 17 *Ves.* 263, was cited.

In reply, it was stated for the assignees that, both from the arguments and decree in *Campion v. Cotton*, it was clear that such a settlement might, in some cases be fraudulent and void against creditors; and that the case then before the Court was a strong case of fraud:—the counsel in support of the settlement in *Campion v. Cotton* admitted this principle. They say, "there is no decision to be found, in which a settlement, previous to, and in contemplation of marriage, has been considered as fraudulent against creditors. That a case strong enough for that purpose might exist cannot be denied; as if the wife was clearly a party; and the marriage a more secure mode of defrauding the creditors: but no such decision has been yet made. The wife must be clearly proved to have had knowledge that a fraud upon creditors was intended. In a late case, *ex parte Rutherford*, the bankrupt had married his servant; executing a settlement, as if he possessed considerable property, covenanting that he would transfer stock to her for her life, with the absolute power of disposition afterwards. Upon her petition to prove the value of the stock under the commission, it appeared that she was told before the marriage

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that he had no property to settle; and it was contended that the transaction was a fraud upon the creditors: but the Lord Chancellor held it a good debt, which she must be permitted to prove; and it stood over merely to inquire when the demand was made, with the view to ascertain that the debt accrued before the bankruptcy. (*Ex parte Mare*, 8 Ves. 335.) The Lord Chancellor certainly did not go the length of stating, that a settlement even upon marriage might not be fraudulent: but that case is an authority that the wife must be clearly proved a party to the fraud, which in this instance is denied, and not proved."

Sir T. *Phummer*, in pronouncing his judgment, said, "I do not think it can be inferred from the evidence, that she knew he was in such circumstances as to make his bounty to her a fraud upon any one. While it was mere bounty, she could not indeed have compelled him to complete her title by conveyance; but from the moment the consideration of marriage intervened, it became matter of obligation upon him to give her all the title he himself had; and there is no proof of any such fraud in her as can prevent her receiving the benefit of that obligation. There is no ground, therefore, upon which the creditors can avoid the settlement, in the whole or any part."

An issue was directed in this petition to try whether the settlement made by *Mayor* was fraudulent: and it was found to be fraudulent.

Mr. *Montagu* for the assignee.

Mr. *Treslove* for respondent.

The following is the order in *ex parte* SUMNER,
ante, 259.

VICE-CHANCELLOR: — Now, upon hearing the said petition read, and what was alleged by Sir *Charles Wetherell* Knight, Mr. *Montagu*, and Mr. *Wheatley*, of counsel for the said petitioner; by Mr. *Pepys* and Mr. *Garratt*, of counsel for *Thomas Greer* and others, joint creditors of the said bankrupt; by Mr. *Rose*, of counsel for , and by Mr. *Knight*, of counsel for the assignee of the estate of the said bankrupts, and declaring interest is not payable out of the surplus of the estate of the said bankrupts, upon the debts of the several creditors proved under the said commission, other than upon such of the said debts as before the passing of the said act of the 6th of the late King were entitled to carry interest: I do order that it be referred to the commissioners, &c. to ascertain and certify what sum of money, in addition to the funds in the hands of the said assignee belonging to the estate of the said bankrupts, will be sufficient to make a final dividend of 20s. in the pound upon the residue of the debts proved under the commission, amounting to the sum of 21,027*l.* 3*s.* 4*d.*, together with interest upon such of the said debts as by law carry interest, having regard to the direction before mentioned. And for the purpose aforesaid, &c.

1 Mont & B 236.
 2 Deac. & B 253.
 3 Bing N. B. 487.
 3 Mont & B. 537.
 3 In D. & Del. 27.
 5 Ch. (D. 373)

CASES

IN

BANKRUPTCY.

2 Del. N. B. 952.

Ex parte DAVIS. — In the matter of
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THIS was an appeal from the decision of His Honor the Vice-Chancellor, reported *ante* 121.

As there were two petitions (*ex parte Davis* and *ex parte Tindal*) in the paper upon sec. 56 (a), relating to contingent debts; and as there had been a conflict of opinion between His Honor the Vice-Chancellor and Lord *Lyndhurst*, with respect to the construction of this section; the Lord Chancellor was pleased to say, that, for the purpose of settling this question speedily, and without expense to the parties, he would request the attendance of the Lord Chief Justice *Tindal* and of Mr. Justice *Littledale*, who were in London: before whom and the Lord Chancellor the case was this day argued.

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L. C.
 Lord C. J.
Tindal.
 Mr. J.
Littledale.
 LINC. INN,
 Aug. 27,
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Where the contingency depends upon the separation of husband and wife, and of a widow's not marrying, it is not within section 56.

(a) See *ante*, 122, where the section is inserted.

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Mr. *Rose* for the petition : —

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The settlement, upon which the question arises, was made on the marriage of *James Rishworth* and *Emma Holdsworth* ; and by an indenture dated the 9th of September 1820, and made between *Thomas Rishworth* and *Sarah* his wife of the first part, *James Rishworth* (the son) of the second part, *Emma Holdsworth* of the third part, and *Godfrey Wentworth* and *John Wentworth* of the fourth part, the said *Thomas Rishworth* covenanted with the said *Godfrey Wentworth* and *John Wentworth*, that he and his wife *Sarah* would surrender to the Lord of the Manor of Wakefield a messuage, farm, garden, and appurtenances, together with certain lands therein mentioned, unto and to the use of the said *Godfrey Wentworth* and *John Wentworth*, their heirs and assigns for ever, in trust and to the intent that the said *Thomas Wentworth*, his heirs and assigns, should take the rents, issues, and profits thereof, until the said marriage should be solemnized ; and immediately thereafter, upon trust that the said *James Rishworth* should receive during his life (or until he should be declared a bankrupt) an annuity of 100*l.*, to be issuing out of and charged upon the said messuage, land, hereditaments, and premises ; and after his being declared a bankrupt, to the intent that the same annuity should be paid to the said *Emma Holdsworth* for her own use, notwithstanding her coverture, in case she were not living separate and apart from the said *James Rishworth* ; and in case the said *Emma* should not be then living, or should be living separate and apart from the said *James Rishworth*, then it was thereby declared and agreed that the same annuity should no longer be payable, but should sink into the said hereditaments and premises so thereby covenanted

to be surrendered, for the sole use and benefit of the said *Thomas Rishworth*, his heirs and assigns for ever ; and after the decease of the said *James Rishworth*, upon further trust that the said *Emma Holdsworth* should, in case she survived the said *James Rishworth*, receive during her life, if she should so long continue the unmarried widow of the said *James Rishworth*, but no longer, one annuity of 100*l.*, to be issuing out of and charged upon all the said messuages, lands, hereditaments, and premises therein-before covenanted to be surrendered, by way of a jointure and in lieu of dower, &c., by equal half-yearly payments, the first to be made within six calendar months of the decease of the said *James Rishworth*, without any deduction on account of taxes, &c. ; with usual powers of distress and entry to the said *James Rishworth* and *Emma Holdsworth* if the same annuities should be in arrear ; and further trusts, to raise by sale or mortgage of the premises 2,000*l.* for the children of the marriage.

On the 21st day of December, a commission issued against *Godfrey Wentworth* and others, under which they were declared bankrupts ; and there were, at the time of the issuing of the commission, arrears due in respect of the annuity, payable during the life of *James Rishworth*, to the amount of 75*l.* 13*s.* 5*d.*

Davis applied to the commissioners to set a value upon the annuity, and that he and *Charrington* might be admitted to prove : upon such application evidence was tendered to the commissioners, of the opinion and affidavit of Mr. *Ansell*, the actuary of the Atlas, and the opinion of Mr. *Kirkpatrick*, the actuary of the Law Life Assurance, as to the value of the said annuity. The commissioners declared, after adverting to the contingencies upon the happening of which the annuities

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would be defeated, that, in their opinion, section 54 (a) applied only to cases where a pecuniary consideration had been given; and they also declared their opinion to be, that the contingent events of the bankruptcy of *James Rishworth*, and the separation of himself and wife, were the subjects of pecuniary computation, and that some abatement should be made from the amount of the valuation of their annuities.

Such are the facts of the case: and it is submitted, that the general enactment in section 54 is not to be limited by the mode of computation in the concluding part of the clause; which was inserted from the case of *ex parte Whitehead*, 1 *Merivale*, 129, in which case a question arose upon the mode of valuing an annuity granted for a pecuniary consideration; and Lord *Eldon* said, “As there are not any peculiar circumstances in this case to affect the price, as it is altered by the effluxion of time, and only by the effluxion of time, I ought to presume that the parties acted fairly at the time when the contract was made, and that the value of the annuity is the original price given, with the variation occasioned by the lapse of time since the grant.” But these words of regulation as to one species of annuity cannot, by any rule of construction, limit the operation of the general words used in the preceding part of the clause.

(a) “That any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity; which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value of the annuity as shall have been caused by the lapse of time since the grant thereof to the date of the commission.”

The commissioners, therefore, have erred in not having estimated the annuity according to the directions of the statute.



Mr. *Pepys contra* :—

The annuity section does not apply, as it relates only to pecuniary annuities; and, therefore, if the debt is provable, it must be by section 56, relating to contingent debts; but, whether the application is made under section 54 or section 56, the answer is the same: the commissioners cannot make the calculation; and it cannot be supposed that the legislature intended the Court to estimate the probability of the husband and wife being separated, or the widow's remaining unmarried. It is, therefore, impossible to be calculated, and, as *lex neminem cogit ad impossibilia*, it is not within the intent of the statute.

The impossibility of this appears from the affidavits respecting the opinions of the actuaries.

The opinion of Mr. *Kirkpatrick* on the value of the annuities is as follows: "I understand, from the case, that Mr. *Thomas Rishworth* granted an annuity for 100*l.* to be received by his son, Mr. *James Rishworth*, for life; and afterwards to be received by the widow of Mr. *James Rishworth* during her survivorship, under the following limitations; viz. if Mr. *James Rishworth* became bankrupt, the annuity was to be received by Mrs. *James Rishworth* so long as she continued to live with her husband, and, after her husband's death, during her survivorship, so long as she continued to remain his widow. From this it appears clear, that the annuity, when granted, was considered payable during the joint lives of Mr. and Mrs. *James Rishworth*, and during the life of the survivor of them, unless Mrs. *Rishworth* should separate from her present husband, or marry

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again after his death; and on neither of those contingencies can I form the most remote opinion, nor ought they, on the chance of Mr. *James Rishworth* becoming bankrupt, to enter into consideration, in forming the calculation, because I have no *data* whatever on which I can proceed. The question, I think, resolves itself to this: to the value of Mr. *James Rishworth's* interest in the annuity, and to Mrs. *James Rishworth's* survivorship interest. At the time Mr. *Thomas Rishworth* became bankrupt, in 1825, Mr. *James Rishworth* was then aged twenty-seven, and Mrs. *James Rishworth* twenty-three; and the present value of an annuity of 100*l.* to be received during the life of a party aged twenty-seven I estimate at 1,732*l.*; and the present value of the like annuity, to be received during the survivorship of one aged twenty-three, after the death of another aged twenty-seven, I estimate at 319*l.*

“ *George Kirkpatrick,*

“ *Law Life Assurance Office.*”

And the opinion of Mr. *Ansell* is as follows: “ The value of Mr. *James Rishworth's* interest in the annuity, on the 25th of December 1825, I consider to have been worth 1,715*l.* 8*s.*; and the value of Mrs. *Rishworth's* reversionary life interest on the same day, 328*l.*—say 2,043*l.* 10*s.*; provided Mr. *James Rishworth* had died or had become bankrupt before his father's bankruptcy, Mrs. *Rishworth's* life interest would, on the 21st December 1825, have been worth 1,795*l.* 2*s.*—say 1,795*l.* 2*s.* The foregoing values suppose money to be improvable at an interest of four per cent. per annum; and Mr. *James Rishworth's* age has been taken at twenty-eight, Mrs. *Rishworth's* at twenty-one. It is proper to remark, that no reference has been had to the contingencies of Mr. *Rishworth's* becoming a bankrupt, of

Mrs. *Rishworth's* separating from him, or of her marrying after his death ; because I am not aware that *data* exist from which to compute the value of such risks. It will, however, be observed, that the occurrence of no one event would void the annuity. Mr. *James Rishworth's* bankruptcy would not do so, without his wife's death or separation from him ; nor would her separation from him, unless he died or became bankrupt ; nor would she be in a situation to marry a second time, except he had previously died ; and, under all the circumstances of the case, I apprehend that a person placed in the situation of an arbitrator between parties of the estate in question, although he might think it desirable to be the payer of an annuity with, rather than without, the contingencies specified, would not feel justified in affixing a money value to them, or in making any deduction from the claim on their account.

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“ *Chas. Ansell.*”

The LORD CHANCELLOR, Lord Chief Justice, and Mr. Justice *Littledale* expressed their clear opinion, that the case was not within the statute, which contemplated the proof only of such contingencies as are capable of valuation, which this was not ; and the LORD CHANCELLOR said, that in the case of *Warner and Baynes, Amb. 589*, to which the Vice-Chancellor had referred, Lord *Hardwicke* had not made a single observation applicable to difficulty of computation.

The decision of his Honour was reversed.

Alderson, J.
and
Patteson, J.
Jan. 1832.

The examination of a third person by commissioners is not evidence for the formation of their judgment, but merely a brief to enable them to interrogate the witness.

In the matter of JOHN GOODWIN, a bankrupt.

MATILDA GOODWIN, the daughter of the bankrupt, was, on the 15th of December 1831, committed by the commissioners in a country commission at Stafford, which had issued against her father.

The commitment stated her examination before the commissioners, and proceeded as follows:—

“Attend to the following depositions taken before us.”

The depositions of two witnesses were then read to her, and, having been read, the commissioners proceeded as follows:

“Q. Having heard the depositions read, do you still abide by the answers you have already given, or do you wish to correct them?”

“A. I abide by the answers I have already given, nor do I wish to correct them.”

The commitment then concluded in the usual form.

Upon this commitment Mr. *Montagu* applied, in vacation time, to Mr. Justice *Bosanquet*, for a rule to shew cause why a writ of habeas corpus should not issue, and why the attendance of the prisoner should not upon the hearing be dispensed with, on account of the distance of the prisoner from London, and her inability to defray the expences of the journey. It was ordered that the attendance should be dispensed with; and the case came on to be argued before Mr. Justice *Patteson* and Mr. Justice *Alderson* in the absence of Mr. Justice *Bosanquet*.

Mr. *Montagu* for the prisoner:—

The questions are two; 1st, Whether the answers, without reference to the examination of third persons, are satisfactory? and, 2dly, Whether, if unsatisfactory with respect to the examination of third persons, the commitment is legal?

Mont at 216.
Hear at 1176.
— 227.

As to the first question, whether the answers, without reference to the examination of third persons, are satisfactory, no doubt can be entertained.

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To this the judges assented, and said that, “although satisfactory, without reference to the examinations of *Sarjeant* and *Caroline Goodwin*, they were, reference being had to such examinations, unsatisfactory. The validity of the commitment, therefore, depended entirely upon the question, Whether a commitment upon the examination of third persons was legal?”

Mr. *Montagu* : — The validity of the commitment depends upon section 34 of 6 Geo. 4, (a) which has always been construed strictly. In *ex parte Vogel*, 2 B. & A. 224, *Abbot*, C. J. says, “*The Court the more readily granted the writ, because this power of commissioners of bankrupts is an extraordinary one, and ought to be carefully watched.*” In *ex parte Isaac*, Mont. & Mac. 27, Mr. Baron *Hullock* says, “It is important to refer to the act of parliament that confers on the commissioners the authority under which they act. They have unquestionably a power to enforce *the production of documents relating to the subject of their legitimate inquiries. It is, however, to be kept in view, that theirs is a delegated power, and must be strictly construed according to the authority given.*” And Mr. Baron *Vaughan* says, “*But it is unquestionably a power to be exercised with caution, and to be looked at with jealousy; as a bare authority, it must be strictly pursued.*” With this construction the practice has conformed, and during the century in which this power has existed there has never before been an attempt to commit upon such testimony. In

(a) See *postea*, 308.

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Crowley's case, *Buck*, 270, and 2 *Swanston*, 1, the question incidentally arose. It was said in argument by Sir *Samuel Romilly* and Mr. *Cullen*, "The commissioners have only authority to commit the bankrupt in case he shall refuse to answer to their satisfaction all lawful questions put to him, or shall refuse to sign his examination; but it appears upon the face of this warrant that the bankrupt was committed on the evidence of the messenger, and not because he refused to answer to the satisfaction of the commissioners. The satisfaction mentioned in the statute is limited to answers given by the bankrupt to questions put by the commissioners. If they are dissatisfied with his answers they may commit him, but then that dissatisfaction must altogether arise from the answers of the bankrupt himself, and not from the influence of evidence which they have received *aliunde*. If the commissioners examine third persons, and contrast their testimony with the answers of the bankrupt, although upon the balance of the evidence they may feel assured that the bankrupt is not speaking the truth, yet, as their dissatisfaction with the bankrupt is caused by the admission of extrinsic evidence, they have not the power to commit him. But admitting, for the purposes of this argument, that they have such power, then according to the statute the deposition of the messenger ought to have been embodied in the warrant of commitment; or otherwise, how is his Lordship to determine whether the answers are satisfactory or not? If the messenger's deposition had been set forth in the warrant, it might have appeared that the commissioners had suffered it to have undue influence with them, and that the answers of the bankrupt were satisfactory." Upon which Lord *Eldon* says, "As it is not necessary for the determination of this case, in the view I take of it, I shall leave the point raised by Mr. *Cullen*,

viz. whether commissioners ought to look for extrinsic information in their examination of the bankrupt, as I find it, untouched. In this case the commissioners have done so; but it does not appear that the deposition was ever read to the bankrupt, nor does it appear what the deposition was, otherwise than as it is stated in the question put by the commissioners." And in the report of the same case in 2 *Swanston*, 79, the Chancellor expressly says, "I desire to be understood as not expressing any opinion, whether commissioners are at liberty to obtain satisfaction on the subject of the examination by application to any other person than the bankrupt. Mr. *Cullen* argues that they are not entitled to resort to evidence *aliunde*, for the purpose of deciding whether the bankrupt's answer is satisfactory or not. I leave that question where it is; but the commissioners here have acted on the evidence of the messenger; and then the question arises, Have they so stated the evidence on the warrant, that the Court can have the same means, if they are due means, as the commissioners had of deciding whether the answer is satisfactory? It does not appear on these proceedings that the deposition of the messenger was made in the presence of the bankrupt, or read to him, or that he had any other information concerning it than the terms of the question."

Such is the rule with respect to the construction of the act; but there are not any words in the statute from which it can be inferred, that power was given to commit upon the evidence of third persons. The words are, "Upon the appearance of any person so summoned, it shall be lawful for them to examine every such person upon oath, and to reduce into writing the answers of every such person, and if any such person shall not fully answer, to the satisfaction of the said commissioners, any

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such lawful questions, it shall be lawful to commit him, &c. (a)

The progress of the exercise of authority by commissioners in these cases will shew the error of this supposition, that the commissioners are to decide as jurymen upon the conflicting evidence of different witnesses; for originally the commissioners were bound to consider the

(a) The words of section 34 are as follows:—"And be it enacted, That upon the appearance of any person so summoned or brought before the commissioners as aforesaid, or if any person be present at any meeting of the commissioners, it shall be lawful for them to examine every such person upon oath, either by word of mouth, or by interrogatories in writing, concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act or acts of bankruptcy by such bankrupt committed, and to reduce into writing the answers of every such person, and such answers so reduced into writing the party examined is hereby required to sign and subscribe; and if any such person shall refuse to be sworn, or shall refuse to answer any lawful questions put to him by the said commissioners touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the said commissioners any such lawful questions, or shall refuse to sign and subscribe his

Examination so reduced into writing as aforesaid (not having any lawful objection allowed by the said commissioners), or shall not produce any books, papers, deeds, and writings, and other documents in his custody or power relating to any of the matters aforesaid, which such person was required by the commissioners to produce, and to the production of which he shall not state any objection allowed by the said commissioners, it shall be lawful for them, by warrant under their hands and seals, to commit him to such prison as they shall think fit, there to remain without bail, until he shall submit himself to them to be sworn, and full answers make to the satisfaction, to all such lawful questions as shall be put to him, and sign and subscribe such examination, and produce such books, papers, deeds, writings, and other documents as aforesaid in his custody or power, to the production of which no such objection as aforesaid has been allowed."

answers satisfactory, as was thus stated by Lord Eldon in *Norris's* case, 2 *Ja. & W.* 438. *The law on this subject was originally this, that if a man said yes or no, his answer must be taken to be satisfactory whether you believe him or not; but since the alteration which has taken place in the law, the Court has to consider whether the answer is satisfactory or not; and the rule now is, that if the answer is not to the satisfaction of the Court he is remanded; if it is, he is discharged: a rule by which personal liberty stands in a very insecure situation; for it has happened, that where the Court of King's Bench thought the answer was quite satisfactory, the Court of Common Pleas thought it quite unsatisfactory.*

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This was the state of the law from the year 1730 to the year 1794, when it was rectified in *ex parte Nolan*, 6 *Term Rep.* 120. In this case it was contended in argument, that if the bankrupt swore positively to the fact commissioners were bound to consider his answers satisfactory; and if doubt were entertained with respect to it, it ought not to be thus decided without a trial, by confining the prisoner for life. But the Court, taking for granted that no testimony of a third person could be received, adjudged that the commitment was good, because *the account given by the bankrupt was incredible.* (a)

(a) This case is of such importance, and of such very frequent occurrence, and upon which there has been such a conflict in practice, that it is thought right to subjoin the whole of the examinations and commitment.

Examination of M. Goodwin.

What relation are you of the

bankrupt?—I believe daughter; the only daughter.

Has your father's house always been your home, and up to what time?—It has always been my home up to the time the bailiffs entered.

Was you at home when the messenger entered on Friday the 25th day of November?—I was at home on that Friday morning.

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That commissioners are entitled to examine a third person is indisputable, because they are entitled to exa-

Was you at home the day before?—I was.

When did you leave the house? —As soon as the bailiffs entered.

Have you been in the house since, and when last?—I have been in the house since several times, and the last time on Monday last.

Having been in the house on Monday last, have you a knowledge of the furniture then in it? —I was only in the kitchen and parlour.

State what furniture was in the house when you left it, to the best of your knowledge and recollection?—I cannot state all; I can state a few.

Do you wish to refresh your memory by now going to the house and looking it over?—I will go and look at it.

Having seen the house and furniture therein, is there the same furniture there now as your father at any time possessed whilst residing there?—To the best of my knowledge there is, but I cannot say at any time.

Is there the same furniture there now as your father possessed and had in that house at any time within the last twelve months?—There is, to the best of my knowledge; there might be others, but I cannot say.

Is there not a sitting-room

upstairs, and was not that room furnished at some time when your father lived at that house? —It was furnished, but the furniture was not always in that room; but the furniture was taken out of the parlour and put in that room when it was wanted.

Is that furniture, which you say was taken out of the parlour and occasionally put in the sitting-room, now in the house; if not, was it there when the messenger entered?—It is not all there now, nor was it there when the messenger entered.

What furniture was that which you say is not there now?—The glass is not there; also some chairs; there might be five or six; also a table; also a small square table. I do not know of any thing else.

What has become of the articles last mentioned, and when were they taken from your father's house?—That I cannot say.

When did you see them last; state the time to the best of your knowledge?—I cannot state the time; I have no recollection.

Was not the glass in the house the day or a few days before the messenger entered?—No, it was not.

When did you last see it, or about when?—I cannot say; it is many months ago.

mine any person who can give information respecting the bankrupt's estate; but the use of such examination

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Was there not a mahogany table, a circular-end table, a carpet, some stained imitation rose-wood chairs with cane bottoms, and other articles of furniture, belonging to this room, besides that in the parlour?—Not that I ever knew of; if there was in the house, it was unknown to me.

Was there not a carpet put down in this room, and which belonged to it?—There was a carpet sometimes used in this room, and which belonged to the best, or my bedroom.

Was there not window-curtains belonging to this room?—No, there was not.

Was there not a piece of furniture, with drawers and cupboard above, in this room?—No, there was not.

Was there not a wire fender with brass top in this room, or in the house?—No, there was not.

Had not the sofa now in that room a loose bottom cushion and a cover?—It had a loose bottom, which was made into a bed. I never saw any cushions; there was a cover once, which was cut up for different uses.

When was the loose bottom made into a bed, and when was the sofa-cover cut up, as you say?—It may be eight or nine

months since the cover was cut up, and three or four months since the sofa bottom was made into a bed.

What became of the bed made from the sofa, and what has become of it, and when did you last see it?—I do not know what has become of it, nor when I last saw it.

For what purpose was the cover used?—I cannot say.

Were or were not the parlour and sitting-room both furnished at one and the same time, viz. was there not furniture in both rooms at one and the same time?—No, there were not, that I know of.

How many pair of bedsteads had your father at any time in that house upon that first floor?—He had three pairs on the first floor.

Were the same bedsteads there which had usually been there when you left the house and the messenger entered?—They were all there that usually were, except one pair.

Which pair do you except?—There was a different pair in the best bed-room.

What became of those that had been in the best bed-room, and when did you last see them?—I cannot say what became of them, or when I last saw them.

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is not as evidence for the formation of their judgments, but as a brief to enable them to examine the person

About what time did you last see them?—Very near twelve months ago.

Where did the bedsteads and hangings now in the best bedroom come from, and in what part of the house had they previously been?—The bedsteads used to stand in my father's room, and I never knew the hangings used to any other bedsteads.

Were they ever used to a bed in the attic?—No; they never were, to my knowledge.

What room do you usually sleep in, and how long in that room?—I slept in the room over the parlour for the last twelve months.

Did you sleep in that room when *Caroline Goodwin* lived with your father, and upon the same bedsteads as are now there, or were they different?—I slept in that room sometimes when *Caroline Goodwin* lived there, but not on the same bedsteads as are there now.

Having slept upon the bedsteads that were previously there, you are again asked what became thereof, and when about they were removed?—I cannot tell what became of them, or when about they were removed.

Previous to your sleeping in that room, where did you sleep?—I slept in the attic.

Where are the bedsteads you then slept upon?—They are now in the room over the shop.

Where did *Caroline Goodwin* sleep; and did she sleep with you when you slept in the attic upon the bedsteads you have mentioned?—She slept in the attic, and with me, when I slept in the attic, upon the bedsteads now in the new room.

When were the bedsteads now in the new room brought down out of the attic and put there; and was it before or after *Caroline Goodwin* left?—They were removed there a long time ago; it might be before *Caroline Goodwin* left, for aught I know.

What bedsteads were in the room before?—None that I know of.

Did you not for some time sleep in that room upon four-post bedsteads with white furniture?—No, I did not.

Was there a painted chest of drawers and a bureau in this room, or in your father's room?—There was an oak chest of drawers in the new room, but no bureau, and a painted chest of drawers in my father's room.

What have become of the chest of drawers which stood in the new room, and the painted ones you have mentioned, and when did you last see them?—I do

whom they suspect. This is explained in an analogous case *ex parte Campbell*, 2 *Rose*, 51, where an attempt

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not know what has become of them; I have not seen them for many months; cannot say when.

Do you mean to say, that with the exception of the bedsteads taken out of the best bed-room, that all the other bedsteads your father ever had in that house are now there?—Yes, they are, for what I know.

What linen, bed or table, did your father possess?—That I know nothing of.

What glasses, ale or wine or decanters, did your father possess?—I never saw but two or three decanters, and a few glasses. We once possessed half a dozen wine and ale glasses.

How many feather-beds had your father?—I never saw but three.

How many were in the house when you left it?—I do not know whether two or three.

Had not your father a clock in the house place, and a sofa in the parlour?—Yes; my father had a clock and a small sofa in the parlour.

What has become of the clock and sofa, and when did you last see them?—I do not know what has become of them; I have not seen them for many months.

Do you know who has them or who took them away?—No.

What age are you?—I am turned eighteen.

Of what persons did your father's family consist?—Of my father, my mother, my brother about seven years of age, and a servant girl, and myself.

Were not your father and mother usually absent three days in each week attending markets?—Within the last twelve months my father usually went alone; but my mother has been with him during that time sometimes; and before the last twelve months my mother was usually in the habit of going with him.

During their absence, did not the entire care and management of the house devolve upon you?—Yes.

How long had your father left home when the messenger entered?—He left home the Wednesday but one before.

Did you reside in the house from that time until the messenger entered?—Yes, I did.

What shoes did you take in from the workmen after your father left?—Two pairs.

What became of them?—My mother had one pair and I the other.

Did you send any shoes to any person, and whom, and by whom, after your father left his dwelling-house?—I gave two pairs of shoes

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was made to read under one commission the deposition of a party taken under another commission.

to a man, who said he came for the two pair of shoes that *Mericks* had. I did not know the man.

Did you know for whom or why he asked for them?—No, I did not; I had not time to ask him.

Attend to the following depositions taken before us.

Deposition of Joseph Sarjeant.

At a meeting at the office of Mr. *Charles Hint*, in the borough of Stafford, in the county of Stafford, the 14th day of December 1831. By adjournment from yesterday.

Joseph Sarjeant of Stafford, in the county of Stafford, joiner, being sworn and examined, &c. before the commissioners, &c. in a commission, &c. issued, &c. against *John Goodwin*, &c., upon his oath saith, that he knows the said bankrupt, and has been employed by him as a joiner at different times during the last twelve months, and was so employed to put up cornices to two windows in the sitting-room upstairs, and was again in that room about three or four months since: That at both those times the sitting-room upstairs was furnished, which furniture is now removed: That at the time he saw the said sitting-room he also

saw the parlour, which was also furnished: That he was also at the dwelling-house of the said bankrupt about six weeks before he left the same, and that the clock was then in the kitchen: That witness put a cornice to a bed in the room over the parlour, which bed is now removed; it was a bed with fringe to the furniture: That the bedsteads and hangings now in that room was in the attic, where this examinant believes the servant girl slept: That the bedsteads now in the room over the shop are not the same as those in that room when he saw them, and which this examinant set up: That those now set up in that room are of very far inferior value to those that usually stood there: That in the other room, where the bankrupt and his wife slept, there was a tent-bed with hangings, which are also removed. In the sitting-room there was a large round mahogany table stood in the middle of the room, and, I think, a dining-table with leaves. The curtains in the sitting-room were put up when I put the cornices up, and I put pins in, which are now removed. There was a carpet on the floor, which I assisted to put down; it was a new one, and put down last March assizes but one. I believe the chairs were

Mr. *Hart* and Mr. *Montagu* objected, that the admission of such evidence was against principle; and although

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painted rose-wood, and had cane bottoms. There was a green table-cloth upon the table in the middle of the room. There was a pier glass over the chimney-piece; I fixed it up. There was a wire fender with a brass top. There were many pictures in the room; I fixed them up. There was a book-case, with folding-doors at the top, and drawers underneath; it was mahogany. I have removed it when putting down the carpet; it stood opposite the fire-place; it has been taken away. There was a mahogany four-post bedstead in the best bed-room. There was a swing looking-glass stood up upon a dressing-table; also a mahogany chest of drawers; six chairs; also a night chair: I repaired it. Green wire fender, with brass top. Window curtains; I took them down and put them up. In the bed-room, where the bankrupt and his wife slept, I recollect seeing a small swing looking-glass upon a dressing-table. There were window-blinds; I made the rollers for them. In the room where the bankrupt's daughter slept there was a looking-glass upon a dressing-table, a small chest of drawers painted blue and white, and also a bureau; they have been taken away; also window-blinds; I made the rollers. In

the parlour down-stairs there was a pier glass; over the chimney-piece many pictures; I put up the brass hooks in the wall to hang them up on. There were two mahogany tables and round stand; one is there now, and the other two are gone; also window curtains; also a green wire fender, with brass top and knobs; also a carpet and hearth-rug. There was a case of stuffed birds; I have seen it in some part of the house, and to the best of my knowledge it was in the parlour. I have seen a tea urn. About three or four months ago I was in the sitting-room upstairs; the room where the bankrupt and his wife slept; the room where the bankrupt's daughter slept; the kitchen and the parlour down-stairs; and the above articles of furniture I saw therein at that time. I did not see the best bed-room at that time; I saw it at the beginning of this year, about March assizes. The furniture as stated was therein at that time. *William Goodwin*, an apprentice with *William Beech*, repaired the sofa and the floor in the sitting-room. There was a sofa in the parlour down-stairs, with a loose bottom or mattress upon it. I put up a table-deal in the kitchen; it has been taken away.

JOS. SARJEANT.

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it was said in opposition, that the deposition was under the sanction of an oath, and the hazard of an indictment

Examination of Caroline Goodwin.

At the office of Mr. *Charles Hint*, in the borough of Stafford, in the county of Stafford, the 13th day of December 1831.

Caroline Goodwin of Stafford, in the county of Stafford, spinster, being sworn, &c., upon her oath saith, that she is about thirteen or fourteen years of age; that she lived with the bankrupt near two years, and left in May last; that there was not any other servant whilst I was there. He lived near to the churchyard. I slept in the attic by myself. My uncle and aunt slept in one of the back rooms. Miss *Goodwin* slept in one of the front rooms, in a white bed; the best bed was a green bed; no one slept in that without they had company. There was a sitting-room up-stairs, where was no bed. There was another garret, which contained my uncle's leather, but no bed. There was only three beds, besides those upon which I slept. I did not make the beds; my aunt and Miss *Goodwin*, generally my aunt, when she was at home, but she went out with my uncle three times in a week to the market; to Newcastle on Monday, to Uttoxeter on Wednesday, and Lichfield on Friday; and when she

went out Miss *Goodwin* then made the beds. There were three rooms, the kitchen, the parlour down-stairs, and the sitting-room up-stairs, all furnished. There were in the kitchen housekeeper's cupboard, a dresser with drawers and shelves, a clock, some chairs, oven and grate, table under the window, a white one; there were three saucepans and kettles, and a many tins and brasses, but I do not think there were any tin covers; either four or five brass candlesticks; either two or three pair of snuffers, and a brass snuffer tray. There were two copper tea kettles kept on the mantelpiece, and we used a tin one. There were three copper ones in all, but one was lost, and two remained. There was a sofa in the parlour, with a printed cotton cover, with a loose bottom; a few pictures. There were chairs; four or five with cane bottoms. I think there was a glass over the chimney-piece; it was either there or in the sitting room up-stairs. There were three tables in the parlour; cannot say what sort, whether mahogany or oak. There were no window curtains in the parlour, but blinds. There was a green wire fender, with a brass top. The fire irons hung in the kitchen. There was an old carpet on the parlour floor, and a

for perjury, the Lord Chancellor said, “ *To the extent of guiding the commissioners in the prosecution of an in-*

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hearth-rug. There were wine and ale glasses, and two or three decanters. There was a tea-urn, which stood sometimes on a table in the parlour, and sometimes in the closet up-stairs. In the sitting-room up-stairs there was either three or four tables; one stood in the middle of the room; there was one that was half round stood aside of the window. There was a sofa couch larger than that down-stairs. There were six chairs, painted with flowers on them. A green cloth on the breakfast table. The window curtains were white, with pink at the edges. A green fender, with brass top and claws, painted brown, I think. There were fire-irons for this room kept down-stairs. I do not recollect a carpet, but I do a hearth-rug. In the best bed-room there was drawers, and a cupboard above, with two wood doors, in which they put pickles and books. That the bed was a four-post bed, and the hangings green moreen, with a painted cornice, and green fringe. There was a looking-glass, and stood upon a dressing table in the room, a painted dressing table; the glass had a bottom to it, and drawers; the dressing table served for a wash-stand. There were six chairs in this room, with hair cushions that

would take out, and we put covers to them. I do not think there was a carpet. There was either an iron or steel fender for this room, which used to hang up in the kitchen. No window curtains, but blinds. In my uncle's bed-room there were tent bedsteads, with yellow furniture, printed; a wash-stand; two or three chairs; bedside carpets, old ones; window blinds. Miss Goodwin's room had a bed with white furniture, a swing looking-glass, but no drawers; there was a dressing table with a white cover, but no wash-stand; there were three or four chairs, a bureau in this room, and a chest of drawers, painted. In the garret four-post bedsteads and hangings. My aunt kept her linen in the drawers; I do not know what linen she had. Mrs. *Humphreys*, Malt Mill Lane, washed for her. In the cellar there were barrels. I do not know how many silver spoons there were, but have seen my aunt clean them. Bankrupt kept his shoes in hampers in the shop. The shoes that came in from the workmen he hung up upon lines in the shop. There were steps, and dresser and shelves, and a round table, in the back kitchen. Miss Goodwin was generally at home. She lived at home. She only went out once

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quiry under their commission, such depositions may be used with correctness and advantage ; but I cannot, in a

or twice whilst I lived there. She was out a fortnight or three weeks at a time. Mrs. Goodwin could not spare her more.

The mark of

✕

Caroline Goodwin.

At the office of Mr. Charles Hint, in the borough of Stafford, in the county of Stafford, the 15th day of December 1831.

Caroline Goodwin of, &c., spinster, being duly sworn and examined, &c. before the major part of the commissioners, &c., upon her oath saith, that she has this morning viewed the dwelling-house of the bankrupt and the furniture therein, and that there is not the same furniture there now as when she lived there; that three pair of bedsteads that stood in the sleeping room over the parlour, in the room where the bankrupt and his wife slept, and in that in which Miss Goodwin slept, are all removed; and in the room over the parlour is placed the bedsteads in which this examinant slept when there, and which stood in the attic; and in the other two rooms are placed two pair of stump bedsteads which this examinant never saw before; that in no one of these

rooms is there any article of furniture that was there when this examinant lived there; that the small nest of drawers now in the best sleeping room always stood in the attic where this examinant slept; that all the furniture, except the sofa, is taken out of the sitting room up-stairs; that a cupboard is gone from a passage up-stairs, and a clock out of the house place; that the chairs that were in the sitting room up-stairs and in the parlour are gone, and those now in the parlour used to be in the kitchen, and those now in the kitchen used to be in the brewhouse; that the sofa and table are also gone out of the parlour; that other articles of furniture are also gone; that the sofa now left in the sitting room is not complete, the bottom cushions and cover are not there.

The mark of

✕

Caroline Goodwin.

Having heard the depositions read, do you still abide by the answers you have already given, or do you wish to correct them? —I abide by the answers I have already given, nor do I wish to correct them.

Do you know of any furniture being removed from your father's house since he left home, or for

matter of litigation, consider them as evidence." And the same principle is recognized in *ex parte Coles*, 3 *Mad-dock*, 115.

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Such has been the practice and progress of the law, of which the principle is clear, which is, that he may be committed on his *own answers*, and he may be indicted on the *testimony of others*; but it never was intended that the commissioners should act as a jury, and that the person under examination should be subject to all the expence and vexation attendant upon the examination and cross-examination of witnesses, and the

some time previous thereto, and since *Caroline Goodwin* left, or has any such been removed?—I do not know of any furniture being removed from my father's house since *Caroline Goodwin* lived in my father's service, and none has been removed that I know of.

Must you have observed it if furniture had been removed?—I must if it had been anything particular.

If such things as chests of drawers, bedsteads and hangings, tables and chairs, had been removed from the house, must you have observed it?—Yes, I must.

Do you still say that such articles have not been removed from the house?—I do not know anything about their being removed, or that they were removed.

Are the feather beds now in the house the same which your father possessed previous to his leaving his dwelling-house?—They are, for what I know.

Have you seen them this morning?—I have.

Do you or do you not know whether they are the same beds your father possessed, or whether those now there have not been substituted, and those of your father taken away?—They are the same my father always had, for any thing I know.

Must you not have known if they had been changed?—I have always seen those beds in my father's house.

You having said your father had three feather beds, and there being only two now in his house, what has become of the other, and where did you last see it — I cannot say; it is a long time ago.

Do you know what became of it?—No.

Which answers of the said *Matilda Goodwin* not being satisfactory to us the said commissioners, these are therefore to will, &c.

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necessity of calling opposite witnesses, and of calling witnesses to character. This would not only be impracticable, but would defeat the object of the legislature, by deferring the commitment until the conclusion of the trial; and, even if practicable, would be unjust, as it would be exposing the party to an indictment for perjury or concealment, after a judicial declaration that he was guilty. But, even if such power is given to the commissioners, it must be exercised in presence of the person accused, that he may not be deprived of the right of cross-examination, which was not done in the present case, as the depositions were taken in the absence of the person committed.

The Judges interposed, and expressed their wish to hear Mr. *Swanston* on the other side.

Mr. *Swanston* : — Since the decision in *ex parte Nolan*, that the commissioners are not bound to believe the positive oath of a person under examination, it follows, that, unless they are to decide upon part of the truth instead of the whole truth, they must be entitled to examine any person from whom the truth can be obtained: and, although there is not any express decision upon the subject in *Crowley's case (a)*, it is obvious that the inclination of Lord *Eldon's* opinion was in favour of this mode of proceeding. The commissioners being at liberty to discredit the examination, are not confined to intrinsic vices, as inconsistency, but may resort to extrinsic tests of probability, as their preconceived opinions of the habit of human nature, and the ordinary course of events; why not to the established forensic test of probability, the testimony of witnesses? As an examinant committed for unsatisfactory answers could not be denied the privilege of tendering testimony in support of the truth of his statement, why is testimony inadmissible against him?

(a) 6 J. R. 120.

The Judges here stated it to be their clear opinion, that although the whole of the commitment, including the depositions of *Sarjeant* and *Caroline Goodwin*, was valid, yet that the commissioners had no right to commit upon the evidence of third persons, and that the depositions of *Sarjeant* and *Caroline Goodwin* must therefore be excluded from their consideration, and that their opinions must be formed solely upon the answers of the prisoner.

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It was then notified, that since the application had been made for the rule to show cause, the prisoner had been re-examined before the commissioners and recommitted. (a)

The habeas corpus was ordered to issue.

The case was argued on a subsequent day, when it appeared that the re-examination was subject to the same objections as the former examination, and the prisoner consequently was discharged.

42 Ca. 785

2 Mont 4133

Ex parte MOULT.—In the matter of BARROW and GEDDES.

COURT OF
REVIEW.
Jan. 27.

THE petition stated, that *Geddes* was concerned in four different houses of trade, as follows :

1 Mont 420

Members.	Place and Business.	Firm.
T. Barrow. G. Geddes.	Manchester. Commission Agents.	Thomas Barrow & Co.
G. Geddes. T. Johnston.	Cheapside. Warehousemen.	Thomas Johnston & Co.
G. Geddes.	Stockport. Cotton Manufacturer.	G. Geddes & Co.
G. Geddes. T. Radcliffe.	Stockport. Cotton Spinners.	T. Radcliffe.

(a) *Ex parte* Page, 1 B. & A. 574.

2 Mont 4257.

3 — 1835

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The petition further stated, that a commission had issued against *Thomas Johnston*, and another commission had issued against *Thomas Barrow* and *George Geddes*.

That *Williams* and Co., bankers in London, were the holders of a bill of exchange, drawn by *Barrow* and *Geddes*, under the firm of *Thomas Barrow* and Co., and accepted by *Thomas Johnston* and Co., and indorsed by *G. Geddes* and Co. and by *T. Radcliffe*.

That the bill was proved by *Williams* and Co. on the 18th of November 1828, under the commission against, the acceptors, *Thomas Johnston* and Co., under which a dividend had been declared before the 25th of March 1830.

That on the 25th March 1830, *Williams* and Co. proved the whole amount of the bill against the joint estates of *Barrow* and *Geddes*, and the difference between the whole amount and the amount of the dividends declared under the commission against *Thomas Johnston*, against the separate estate of *Geddes*.

The petition further stated, that, until the bankruptcy of *Barrow* and *Geddes*, *Williams* and Co. did not know, suspect, or believe that *George Geddes* was a partner in the firm of *Thomas Barrow* and Co., or that he was a partner in the firm of *Thomas Johnston* and Co., but believed and considered that the same firms, and also the firm of *Geddes* and Co., were composed of different and distinct persons.

The petition prayed that Messrs. *Williams* and Co. might elect; and, if they elected to remain creditors against the joint estate, that then the proof might be reduced by the sum of 85*l.* 10*s.* 8*d.*, the amount of dividends declared under the commission against *Johnston*.

Mr. *Wigram* for the petition : —

There were two questions; 1st, as to the right to a double proof (*a*) ; 2d, which was too clear for argument, as to the necessity of deducting from the debt to be proved the amount of the dividend declared.

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Mr. *Montagu* for the respondents :

There are two classes of cases upon proofs in partnership, which are attended with some difficulty :

1st, As to election ;

2d, As to double proofs.

As to election, it certainly is the rule in bankruptcy, that if a creditor has been so vigilant as to secure to himself both a joint and separate security, he cannot avail himself of the advantages of his vigilance, but must elect against which estate he will prove.

Election.

The principle of this doctrine is unintelligible. At law a creditor may prove against drawer, acceptor, and every indorser ; and, if the drawer happen to be a member of the firm which has accepted, the creditor has the same rights, as he may issue execution both against the joint and against the separate estates : but by an arbitrary rule in bankruptcy he is deprived of his legal rights, and obliged to confine himself to one estate. This rule is, however, against the approbation of Lord *Eldon*, who, in *ex parte Bevan*, 9 *Ves.* jun. 223, upon a question, whether a person, having a joint and separate security, could receive dividends only from one estate, where the counsel, upon the authority of *ex parte Rowlandson* (*b*), gave up the point, the Chancellor said, “ *It is not necessary to decide the other question, as to the joint and several proof ; if it was, I am not perfectly satisfied with the authority that has been stated.*” And in *ex parte*

(*a*) The argument as to the double proof will be found in the reply.

(*b*) 3 *P. Wms.* 405.

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 and another.

Bevan, 1804, 10 *Ves.* jun. 109, the Lord Chancellor says, "I do not recollect that it was ever argued to this extent, that a creditor, having both securities, should be in a better situation. The principle seems obvious; yet in bankruptcy, for some reason not very intelligible, it has been said, the creditor shall not have the benefit of the caution he has used. I never could see why a creditor, having both a joint and several security, should not go against both estates; but it is settled he must elect."

The same opinion was entertained by Lord *Thurlow*, who thought that a joint creditor ought not to be deprived of his right to enforce judgment under a statutable execution in the same mode as he would have been entitled under a common law execution, by proceeding against both the joint and separate estate of the debtor; as appears in various cases cited in 1 *Montagu*, 221.

If there is any principle for this arbitrary rule, it must be that the creditor, with his eyes open, and knowing the consequences in the event of bankruptcy, has consented to submit to the rule.

Double Proof.

Admitting this to be a principle sufficient to support the rule, it has never been supposed to extend to a case where the creditor has been misled by the debtor; where he has intentionally concealed from the creditor a knowledge of the facts, with which if he had been acquainted he would not have taken the bill. In these cases it is not the creditor but the debtor who is to suffer.

"Nec lex est justior ulla
 Quam necis artifices arte perire sua."

In *ex parte Sillitoe*, 1 *Glyn & Jam.* 383, Lord *Eldon* says, "I well remember the case of *Shakeshaft, Stirrup*, and *Salisbury*. There were four or five persons in a partnership; some of them carried on business in Liverpool, some in other places, and the credulous world took it for granted they were different, though they

were in fact so many wheels of one machine. Another relaxation of the rule was therefore admitted, that where there is a demand arising from a dealing by the partnership in a distinct trade, proof might be admitted."

In *ex parte Biggs*, 2 *Rose*, 38, Lord *Eldon* says, "Where the object appears to be to give the bill a character of respectability by such distribution of the names of a partnership, the Court has said, that the parties to such an arrangement shall not avail themselves of it against their knowledge of the method in which the obligation of the firm ought regularly to be created."

With respect to the case of double proofs, the right, therefore, depends upon the creditor having been ignorant that the parties to the bill, although apparently different, are, to a greater or less extent, really the same.

The rule therefore is, that wherever there are distinct firms, and the creditor is ignorant that they are composed of the same members, he has a right to a double proof.

In *ex parte La Forest*, 1798, *Cooke*, 266, *Corson* and *Johnson* (the drawers) were apothecaries at Brentford. *Corson*, *Gordon*, *Whincup*, and *Griffin*, were soap manufacturers, under the firm of *Whincup* and *Griffin*, at Brentford, and were the acceptors of the bill. The Chancellor ordered that the commissioners should inquire whether the petitioners, or either of them, at the time of their respectively taking the respective bills of exchange and promissory notes in the petition mentioned, knew that *Alexander Corson* and *James Gordon*, and *Whincup* and *Griffin*, were concerned and engaged in one partnership, carried on under the firm of *Whincup* and *Griffin*, or not; and if the petitioners knew of such partnership, then they were to be at liberty to

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apply to the Court, as they should be advised; and if the petitioners did not know of such partnership at the time of their receiving the said bills of exchange and promissory notes, then such of the petitioners as did not know of such partnership were to be admitted to prove against the respective joint estates of *Corson* and *Gordon*, and of *Whincup* and *Griffin*.

Ex parte
Benson.

Ex parte Benson, 1798, *Cooke*, 268. *W. Houghton* and *J. Houghton* were grocers, and the acceptors.

Marsh, *W. Houghton*, and *J. Houghton*, were cotton manufacturers, and drew in the name of *Marsh*.

The petitioners did not know that *Marsh* had any connection with the *Houghtons*.

The petitioner was adjudged to be entitled to prove against the joint estate of the *Houghtons*, and the separate estate of *Marsh*.

Ex parte
Bonbonus.

In *ex parte Bonbonus*, 8 *Ves.* 546, Lord *Eldon* says, “There have been many cases, particularly in the bankruptcy of *Burton*, *Forbes*, and *Gregory*, where three or more partners, being also concerned in other trades, the paper of one firm was given to the creditors of another, and they were permitted to take dividends from both estates.

Ex parte
Adam.

Ex parte Adam, 1813, 1 *V. & B.* 493. Five persons, of whom *Harrison* and *Gorst* were two, carried on business at Sunderland under the firm of *S. Cooke* and Co.

Harrison and *Gorst* carried on a distinct trade, under the firm of *Harrison* and *Gorst*.

The petitioners were the holders of bills drawn by *S. Cooke* and Co., and accepted by *Harrison* and *Gorst*.

The double proof was ordered, the Lord Chancellor saying, “Here being an express bargain for double security, the parties are entitled to it, the houses being distinct.”

In *ex parte Husband*, 2 G. & J. 5, the Lord Chancellor says, "It is clear, that where a party takes a bill drawn by some members of a firm carrying on a distinct trade, on the firm, in ignorance that the drawers constitute part of the firm of the acceptors, proof is admitted against both the drawers and acceptors; and it is equally clear, that a person holding a joint and separate security for the same debt is in bankruptcy bound to elect."

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Ex parte
Husband.

There are some cases where a creditor takes a bill, in ignorance that the apparently different parties are, in a greater or less degree, really the same, where the creditor is not entitled to a double proof; and, by confusing the general rules with these exceptions, the law may be mistaken. These exceptions are of two classes; of which the first is, where there are no distinct houses of trade, as in *ex parte Bigg*, 1814, 2 Rose, 37; where there were not any distinct houses, Lord Eldon says, "*In all the antecedent cases the individuals had subdivided themselves into distinct partnerships;*" a rule recognized by Lord Eldon in *ex parte Walker*, 1 Rose, 442, which was upon a bill drawn by one member of a firm upon two members of the same firm.

Distinct
houses.

Sir S. Romilly and Mr. Bell said, that this was not a draft of one upon the firm, but one of several partners drawing upon two other partners, *a distinct house*, clearly establishing a double security.

The Lord Chancellor assented to the distinction, and directed the dividends to be paid.

There is some shadow of principle to support this class of cases, because the creditor may be said not to have exercised ordinary vigilance, as he must have taken the bill with knowledge that the parties were members of the same firm, without having been misled by the appearance of different firms.

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 Dormant
 Partner.
 Election.

The next class of cases is, where the creditor, having, at the time the commission issued, a right to a double proof, has waived his right, and elected a separate proof. In *ex parte Liddell*, 1812, 2 *Rose*, 34.

Hitchcock, *Graves*, and *De Prado* traded under the firm of *Peter Graves* and Co. at Hull.

De Prado resided in London.

Peter Graves and Co. were the drawers, and *De Prado* the acceptor.

The creditor, at the time the commission issued, was ignorant that *De Prado* was a dormant partner of the firm of *Peter Graves* and Co.; he, therefore, had, within the rule, a right to a double proof; but as, instead of a joint commission, there were two separate commissions, the one against *Hitchcock*, and the other against *De Prado*, the creditor, instead of insisting upon his right on the both, elected to prove against the joint estate under each commission. The Lord Chancellor says, “The holder of this bill of exchange, modelling his proof upon the right which the law gave him, either of confining his claim to the visible members of a partnership, or of extending it to the dormant, has made a deliberate, and, I think, conclusive election. Adopting the aggregate liability of all his debtors, he is excluded now from resorting to them individually.” And he repeats this reason for his judgment, upon citing the case in *ex parte Adam*, 1 *V. & B.* 495, where he says, “My opinion was, that he had made his election, if it was a case of election, by proving against the joint estate under *Hitchcock’s* commission.”

Ex parte Husband, 1820, 5 *Mad.* 419, 2 *G. & J.* 4. *Isaac Blackburn* and *Peter Blackburn* traded at Plymouth in the name of *Isaac Blackburn*.

Peter Blackburn carried on a separate business in London.

The bill was drawn by *Isaac* upon *Peter*.

The right, therefore, of the bill holder, at the time of the bankruptcy, was to a double proof.

The bill holder having discovered, after the bankruptcy and before his proof, that *Isaac* and *Peter* were partners, proved as a joint creditor, and was elected assignee.

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In 1820 the petitioner applied for a double proof, which at the hearing he abandoned, and prayed to prove against each separate estate.

The Vice-Chancellor, Sir *John Leach*, decided that the application was too late.

The decision of his Honor was revised by Lord *Eldon*, who says, " It does not appear to me, that this case ranges itself within that class of cases in which, contrary to the ordinary rule of bankruptcy, the holder has been allowed to pursue the contract appearing on the face of the bills, and to have double proof. But I do not think that the petitioners are concluded by any thing that has passed, so as to be prevented now from withdrawing the proof against the joint estate, and being admitted as creditors of the two separate estates.

It appears, therefore, that when a bill-holder once waives a right which he has at the time of the bankruptcy to a double proof, the court, upon the established principle that equality is equity, and assuming, contrary to the opinions of Lord *Eldon* and Lord *Thurlow*, that a creditor who has a double security ought only to have a single proof, will not permit him, for the purpose of securing a double proof, to waive a right of election which he has deliberately made. But neither of these two class of cases, the *first*, where there are no distinct houses, the *second*, where there has been no election in the case of dormant partnership, applies to the present case, where there are distinct firms of which the creditor was ignorant, and

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MOTLY.In the matter
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BARROW
and another.Deducting
dividend.

Decision.

where he has not made any election to waive his original right."

As to the second point, Whether a dividend declared must be deducted? the question is not so clear, either from decision or upon principle.

A sum actually received before proof must be deducted, because the creditor cannot swear that he has not received any satisfaction for the whole or any part of his debt. This, however, was not originally the law.

Ex parte Ryswiche, 1722, 2 P. Wms. 89. *Cock* drew a bill upon *Vandermash*; both became bankrupts, and out of the effects of *Vandermash* was paid forty per cent. The creditors of *Cock* petitioned that they might come in as creditors for the whole 100*l.*, alleging that, though this should be granted to them, yet the effects of *Cock* would not extend to satisfy them their just debt of 100*l.*, even including the 40*l.* per cent. which they had received out of *Vandermash's* estate. The Lord Chancellor: "It is material whether this payment of 40*l.* per cent., made by the assignees of *Vandermash*, was out of the effects which *Cock* had in *Vandermash's* hands; for if so it would be as if paid by *Cock* herself. On the other hand, if the 40*l.* per cent., paid by the assignees of *Vandermash*, was really paid out of *Vandermash's* effects, then *Vandermash's* estate is as a creditor for this 40*l.*, and the creditors of *Cock's* estate must come in creditors for the whole 100*l.*, and to be taken as trustees for the 40*l.* debt paid out of *Vandermash's* effects."

Previous to 49 Geo. 3, c. 135, called Sir S. Romilly's act, when a creditor of the bankrupt called upon a surety for payment, the surety was entitled to the benefit of the creditor's proof. *Ex parte Atkinson, Cooke*, 210; *ex parte Turner*, 3 Ves. 243. But if the creditor received payment from the surety before proof, the surety was without remedy, as the creditor could not swear that he had not

received satisfaction for his debt, and the right of the surety accrued after the bankruptcy.

To prevent this hardship, when the surety, previous to the proof by the creditor, had lodged the amount of the debt with a banker in trust for the creditor, he was permitted to take the money from the banker's, that the creditor might prove the whole debt. Mr. *Cooke*, in his report of this case, says, "*Darling*, as trustee of Mrs. *Huntingford*, and *Baker* on his own account, proved their respective bonds under the commission. The same afternoon, but after the proof made, *Atkinson* paid Mrs. *Huntingford* the money. Previous to *Baker* having made his deposition, *Atkinson* had lodged the amount of his bond in the hands of a banker, in trust for *Baker*, who under those circumstances hesitated to take the usual oath; and, with an intent to enable him conscientiously to do so, he ordered the money to be returned to *Atkinson*, which was done; and then he proved, as before stated, and was afterwards paid the amount of the bond by *Atkinson*."

In *Beardmore v. Cruttenden*, H. T. 1791, *Cooke*, 220, a court of equity, upon the surety bringing the money into court, compelled the principal to prove against the debtor.

Ex parte Leers, 1802, 6 *Ves.* 644. This petition was mentioned several days; the Lord Chancellor expressing considerable doubt whether a man, having a bill by virtue of which he has three debtors, is not entitled to prove the whole against each estate, until he has received 20s. in the pound. Mr. *Cooke*, being applied to by the Lord Chancellor as to the practice of Guildhall, stated, that a dividend declared was constantly deducted, observing, that in *Brown v. Bullen* it was decided, that an action for money had and received lies for the amount of the dividend the moment it is declared; and it would be singular if the creditor could arrest in that action, and

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yet go before the commissioners, swearing he had received no security or satisfaction whatsoever.

Mr. *Romilly* and Mr. *Leach*, in support of the petition, put the case of a dividend declared immediately; the party at *Hamburgh*, and knowing nothing of it; whether it would be payment in that case.

The Lord Chancellor made the order that the dividends should be deducted according to the practice as stated by Mr. *Cooke*; still expressing doubt as to the principle of it; and, in answer to the objection from the difficulty put as to the creditor taking the usual oath, referring to the case of principal and surety in a bond, the principal being a bankrupt, and the obligee, insisting on payment from the surety, is desired by him to prove under the commission, and he will pay the amount into a banker's.

The next case, *ex parte Royal Bank*, 2 *Rose*, 192, when Lord *Eldon* acted, but most reluctantly, in conformity with *ex parte Leers*. In the conclusion of his judgment in the case of the *Royal Bank*, he says, "It is a great hardship on the *Bank of Scotland*. I give this decision reluctantly, and shall willingly listen to their application to rehear it."

There is the same decision in *ex parte Tod*, in a note, 2 *Rose*, 202.

Such is the state of the decision; and unless it can be contended that money paid into a banker's, or paid into court for the benefit of the creditor, is not as much a satisfaction as a dividend declared under another commission, the rule, which is established, against the opinion of Lord *Eldon*, upon a dictum of Mr. *Cooke's* as to the practice at *Guildhall*, cannot be supported.

Principle.

Nor is there any principle in support of it.

The object of the Court has always been to secure the creditor, by giving him a right to proceed against every

party liable, until he has received full payment of his debt. When he has actually received payment, the sum paid must be deducted, because the creditor cannot swear that he has not received satisfaction ; and when the creditor has received security from the bankrupt's estate, the amount of such security must be deducted ; but if he has received a security from a third person, and even if he has received a separate security from one member of a firm for a joint debt, he may prove against his principal debtor, without any deduction on account of the security, *ex parte Peacock*, 2 G. & J. 27 ; the only anxiety of the Court being, that the creditor shall not receive double payment from the bankrupt's estate, which in the present case he will not, as the dividend declared is upon the estate of a surety.

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The Court expressed itself clearly of opinion that the dividend declared must be deducted, and called upon Mr. *Wigram* to confine himself to the question of double proof.

Dividend declared to be deducted.

Mr. *Wigram* in reply : —

The rule is established by decision ; and as the Court has always treated it as a rule founded on convenience, and not upon principle, it must be considered as an arbitrary rule, which this Court is bound implicitly to follow. The only question is, What is the rule ?

I admit, that if there are two firms, each consisting of a plurality of individuals, and the creditor had no notice that the larger firm embraced the smaller one, double proof is admitted.

Mr. *Montagu*, on the other hand, admits, and cited cases to shew, that if a creditor holds the security of a firm consisting of several persons, and also the separate security of one of the members, and *that member is not a separate trader*, there can be no double proof.

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The present case lies between the two extremes; for in this case the creditor holds the joint security of the firm, and the several liability of one member of the firm, and that one member is *a distinct trader*.

The right to double proof, then, according to the respondent's views, must depend upon this, whether the person who gives the separate security is a separate trader or not. The distinction is unsatisfactory. The general rule is, that when bankruptcy takes place, the joint estate is the property of the joint creditors, and the separate estate of the separate creditors. The cases of double proof against two firms are special cases, the reason for which ceases to operate when it trenches upon the general rule. The order made by Lord *Eldon* in *ex parte Husband* is decisive of this case; for he would not allow a proof against the joint and separate estates.

His Honour the CHIEF JUDGE:— After stating the facts and the points of the arguments, proceeded as follows:

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It is not denied that the case urged by the respondent is most in accordance with legal doctrines and rights; but it was said, that the rule established by practice in bankruptcy is too firmly settled to be now shaken. We have, therefore, taken time to consider whether this rule applies conclusively to this case. The general rule appears to have been first laid down by Lord *Talbot* in *ex parte Rowlandson*. (a) That was the case of a joint and several bond; and it was held, by analogy to the common law, that the creditor must elect to proceed against the joint or the separate estate, and was not permitted to prove against both. This authority was afterwards acted upon in many other cases, which are collected in

(a) 5 P. W. 405.

Mr. *Cooke's* book on the bankrupt laws. The same doctrine, by modern cases, has been extended to bills of exchange, in the cases both of parties and individuals. In *Gray v. Chiswell* (a) Lord *Eldon* says, "It is extremely difficult to say upon what the rule in bankruptcy is founded." So, in *ex parte Bevan* (b), he says, "In bankruptcy, for some reason not very intelligible, it has been said, the creditor shall not have the benefit of the caution he has used. I never could see why a creditor, having both a joint and a several security, should not go against both estates; and it would be easy to point out the inconveniences of the rule. But," Lord *Eldon* adds, "it is settled that he must elect." The question, therefore, in the argument, was properly raised, not upon the rule itself, but upon the exception to the rule. Many cases have been cited which I do not consider applicable. As to *ex parte La Forest* (c) and *ex parte Benson* (d), they were not cases of double proof against the same bankrupt, but rather of distributive proof against different members of the same partnership. So, in *ex parte Walker* and *ex parte Wenslay* (e), here the proof proposed to be made is not against different members of the same firm, but twice against the same parties.

The only case to support such a proof is *ex parte Adams* (f), which proceeded on the ground that there were distinct houses of trade. In that case proof was allowed against the estate of the aggregate firm, and also against the joint estate of two partners. This supports the argument for the respondents; but the circumstances of the case bring it within the exception taken in the argument for the petitioner. The question here is, Whether the proposed proof is the same as if it were to

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(a) 9 *Ves.* 118.

(b) 10 *Ves.* 109.

(c) *C. B. L.* 256.

(d) *C. B. L.* 263.

(e) 1 *Rosc.* 441.

(f) 1 *Rosc.* 305.

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be against two members of a partnership carrying on distinct trades.

The next case is *ex parte Bigg*. (a) But the circumstances of that case do not furnish grounds applicable to this, because there, although the trade was distinct, the creditor knew of the connection. But the language of Lord *Eldon* in *ex parte Bigg* points to the distinction taken in the argument for the petitioners; for he says, "Where the object is to give the bill a character of respectability by such distribution of the names of a partnership, the Court has said that the parties to such an arrangement shall not avail themselves of it, against their knowledge of the method in which the obligation of the firm ought regularly to be created; and in none of the cases was the person against whose estate the second proof was permitted to attach identified in his character as a trader with the partnership of which he was a member." In *ex parte The Bank of England* (b) the party to the bill was a distinct and separate trader, yet he was held not to be entitled to double proof. (c) Lord *Eldon*, the judgment, refers to the distinction pressed upon us; and upon that he says, "In all the cases in which the holder has been allowed to avail himself of his security to the extent of its apparent liability there has been either an ignorance of the union of the parties in one partnership, or a subdivision of them into distinct trading establishments."

But it is said, the authority of this case does not affect the argument, because there the party had the knowledge, whereas here it is admitted that the holders of the bill were ignorant of the connection of the firms. It is argued, that the right of double proof would in such a

(a) 2 *Rose*, 37.

(b) 2 *Rose*, 82.

(c) Note that in this case the Bank knew of the interest of the individual in the firm.

case apply against a single partner, notwithstanding the distinction in law taken by the counsel for the petitioner. There is some distinction in the cases; but I do not propose to rest my judgment on the distinction, but upon the rule of practice, which is said to be arbitrary, and not depending upon reasoning, and that it is in vain to look to reasoning for the extent of the rule or the exception; that the practice limits the rule and the exceptions.

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The doctrine in *ex parte Husband* (a) is decisive. The creditor was ignorant of the connection of the parties in that case; yet Sir *J. Leach* and Lord *Eldon*, although they differed in other points, agreed that the double proof could not be allowed.

The question as to the deduction of the dividends was settled in *ex parte Todd*. (b) No answer has been given to the reasons urged in that case.

The creditor must elect to prove against the joint or separate estate, and the dividends must be deducted.

His Honour Sir A. PELL:— (After expressing his regret that he could not concur in the opinion expressed by the Chief Judge.) This is a question of the greatest importance, affecting to an extensive degree the circulating medium of the kingdom, and attended with serious consequences.

It was said that double proof should not be allowed, because there was an arbitrary rule in bankruptcy on which the decision must be grounded, and on nothing else. Does the rule correspond with the law? It is admitted it does not. Is it consonant to justice? It is almost admitted that it is not. We are, therefore, called upon to give our assent to an arbitrary doctrine,

(a) 1 G. & J. 108.

(b) 2 Rose, 202, n.

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not founded on law or justice. Before I can give this assent, I must have direct and positive authority. I do not wish to run counter to the judgments of learned men, but when my reason is not satisfied, I cannot assent to a doctrine proposed to me without binding authority. It was admitted, in the argument for the petitioner, that the rule is arbitrary. Lord *Eldon* makes the same admission in *ex parte Bevan*. (a) In some of the cases cited on the other side, Lord *Eldon* has said the same thing, and in other cases, according to the reports, he has said just the contrary.

In *ex parte Husband* (b) he says, "It is clear, that where a party takes a bill drawn by some members of a firm carrying on a distinct trade, on the firm, in ignorance that the drawers constitute part of the firm of the acceptors, proof is admitted against both the drawers and acceptors." So that in the very case the Lord Chancellor lays down the rule in terms just the contrary to the judgment given.

How has this happened? Probably from the decision in the first case, *ex parte Rowlandson*, by Lord *Talbot*. I have therefore thought it necessary, in this contradictory state of the law, to look accurately into the facts of that case. It was a case upon a joint and several bond. Such an authority is not applicable to a case upon a bill of exchange. The situation of a drawer and indorser upon a bill of exchange is as distinct as possible from that of the obligees in a joint and several bond. In such a case, at law, you cannot proceed against the joint and several obligees; you must make your election, because they form several and distinct securities. If the action is brought against the joint obligees, you must proceed against them; and you can-

(a) *Ante*, 324.

(b) 2 G. & J. 5.

not proceed against the several obligees, because in proceeding against the joint you proceed against the several. So you cannot proceed against two out of many; you must proceed against all. If you bring your action at the same time against the joint and the several obligees, the several may plead in abatement.

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It is not so in the case of bills of exchange; you may proceed against all, and have execution against all the parties on the bill. This arbitrary rule, therefore, has set out from a case which does not justify the doctrine of the rule. But we have in this case the opportunity of deciding in favour of the double proof, without affecting this arbitrary rule.

The question is, whether this case can be brought within the line of distinction laid down in the books. The distinction is thus expressed (a): “Where bills are drawn by all the partners upon a distinct firm constituted of some of them, a creditor may prove against both estates, if he was ignorant of the connection of the parties; but he is not entitled to prove if aware of the identity.”

This is a court of law as well as of equity. If the decision is to proceed on legal principles, the case is admitted to be clear; if on grounds of equity, it is equally clear; for the principles of equity say, you may get your debt from all the funds of the debtor. This case is within the exception. The several parties on the bill were united in one firm, but that fact was not known to the holder of the negotiable instrument.

When so large a proportion of the property of the kingdom is invested in these negotiable instruments, can it be endured, that where a party takes such a security, with the names of several parties upon it, whom he sup-

(a) *C. B. L.* 251.

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poses to be liable to him as his debtors to the full amount secured by the instrument, he must be content to prove and receive one dividend against all the parties as one person, because it turns out, contrary to his expectation and their engagement, that they are members of one partnership? I may not be bold enough to say at once, that I will sweep away this arbitrary rule; but, if not, I will at least seize upon any distinction which the facts and the authorities furnish.

As to the cases: *Ex parte La Forest* (a) and *ex parte Benson* (b) are in point. The latter case is, as nearly as possible, identical in principle and decision with the present.

Ex parte Adam (c) is also very strong on the same point. *Ex parte La Forest* is cited in that case. The Lord Chancellor observes, as to *ex parte Liddel* (d), that it was singular in its circumstances; and he was of opinion that the petitioner, being ignorant of the connection of the parties, was entitled to prove against both estates. The case was decided on the authority of *ex parte La Forest*, and the ground of this distinction.

In *ex parte Husband* (e) the case was argued and went off on a different point. The question there was, whether the party was bound to elect upon the discovery that the acceptor was a dormant partner in the firm of which the drawer was also a partner, who drew the bill in the partnership name. As it turned out to be one firm, the creditor was held bound to elect.

I cannot, as a common lawyer, understand the principle of this arbitrary rule. It is singular that different rules should prevail as to the administration of property in the court of bankruptcy and in the courts of common

(a) *C. B. L.* 256.(b) *C. B. L.* 251.(c) 2 *Rose*, 36.(d) 2 *Rose*, 34.(e) 2 *G. & J.* 4; *ante*, 328.

law. I think, therefore, that *ex parte Husband* (a) did not decide this point, and that the attention of the Court was directed in the decision to a different question.

In *ex parte Bonbonus* (b), Lord Eldon says, “ There are many cases where three or more partners, being also concerned in other trades, the paper of one firm was given to the creditors of another, and they were permitted to take dividends from both estates.” I cannot see why this case is not within the line of distinction. This, besides, was accommodation paper. The holder gave full value for the bill, which was mere trash, passing through the world on the faith and credit of four or five persons, apparently different, but who, to the injury of the creditor, and his surprise, turn out to be one. If the distinction is not to be admitted, what is the consequence? A person takes a bill, having the names of various persons carrying on distinct trades, and apparently possessed of distinct property, on the faith of which he gives credit. When the day of distress comes, the creditor suddenly finds that the several persons and properties are one. Reason cannot assent to such a proposition or rule of law. I will avail myself of any distinction to do the justice which the arbitrary rule intercepts.

I am therefore of opinion that the double proof ought to stand.

On the other point, the deduction of the dividends, I agree in opinion with the Chief Judge.

His Honor Sir J. Cross : —

This is an appeal against the decision of the commissioners, who admitted the double proof.

It is stated, as a general rule in bankruptcy, that

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(a) 2 G. & J. 4 ; ante. 328.

(b) 8 Ves. 540.

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a creditor, having a double right and remedy at law, must elect, in bankruptcy, to go against the joint or the separate estate. Lord *Eldon* has said, he could never discover the reason of this. But it will not be necessary to disturb the rule in this case.

In *ex parte Adams (a)*, which was a case of five partners, two of whom carried on a distinct trade, proof was allowed against both estates. But the rule being admitted, it is not disputed that there are exceptions to it. Where there are distinct trades and firms, and the party claiming to prove did not know that the parties were the same, it is admitted that in such cases a double proof is allowed. But it is said, that there is another rule, that the exception does not apply to the cases of an individual partner. If there be such a rule, we ought to submit to the established authority of the rule. But I can discover no proof that the rule exists. No authority of any adjudged case, or even of any *dictum*, has been produced to support it.

In *ex parte Adams (a)*, where a major and a minor partnership existed, double proof was allowed; but this, it is said, will not apply to an individual. But *ex parte Bigg (b)* was the case of an individual partner, and the holder of the bill was held not entitled to the double proof, because the trade was not distinct—not upon the ground that he was an individual partner. Again, in *ex parte the Bank of England (c)*, one of the parties on the bill was a distinct trader; but the judgment proceeded, not on that ground, but because the holder knew that he was a partner, and it appeared on the bill itself. I can find no trace in any of the cases of such supposed rule as to individual partners. How does the reasoning apply to the principle of distinct or not distinct traders?

(a) 1 *Rose*, 305.(b) 2 *Rose*, 37.(c) 2 *Rose*, 82.

In *ex parte Sillito* (a) Lord Eldon says, “ In this commercial country it has become of great importance to know what is to be done in cases where the same individual is to be considered as standing in many distinct characters as a member of several firms. If you look at the old law as to bills of exchange, you will find that, in older times, it was found infinitely difficult to deal with paper to which a man was party in more characters than one. Now, to meet the more complicated nature of commercial relations, we say that a man may be half a dozen men for the purpose of binding himself and benefiting others, and for that purpose may put his name upon bills in different characters, and may be a member of many partnership houses. These various relations originally came upon the Court with surprise, and presented great difficulties.” And he then goes on to say, that “ another relaxation of the rule was therefore admitted, that where there is a demand arising from a dealing by the partnership in a distinct trade, proof might be admitted; but then the question, What is a dealing in a distinct trade? is always to be looked at with great care. I apprehend that the principle does not apply more to two persons who happen to be constituent members of a partnership of six, than to one or each of the six, if one or each was a distinct trader.”

As to *ex parte Husband* (b), which is supposed to decide the case before us, it was a case in which creditors, having taken a bill drawn by a partner upon and accepted by his dormant partner, and knowing the fact of the partnership at the time of the bankruptcy, proved against the joint estate, and having made that election, then sought to prove against the separate estate of the

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(a) 1 G. & J. 583.

(b) 2 G. & J. 5.

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dormant partner. They had made an option in respect of a contract arising by implication upon the bill, not by the form of the bill itself; and it was held that they might withdraw their proof against the joint and prove against the separate estate of each of the parties, which was according to the contract as it appeared on the face of the bill, which was several, not joint. There is a material distinction between the cases. Here the bill is drawn by *Barrow & Co.*, carrying on trade at Manchester, and indorsed by *G. Geddes & Co.*, carrying on a distinct trade at Stockport. The word *Co.* does not disclose, *per se*, the explanation that it means *Geddes* only. It is clear the indorser means himself and partners, whoever they may be. Here is every ingredient in the case to entitle the parties to double proof, if no rule exists excluding such proof in the case of an individual partner. Here are two distinct firms, neither disclosing the fact, and two distinct trades. The holder of the bill had no reason to suppose that *Barrow* was a partner of *Geddes*, or that *Geddes* only was *Barrow & Co.* All circumstances concur, and I can find no reason or principle for distinguishing between major and minor partnerships and an individual trader, a member of a partnership.

I think the Commissioners right, and that the double proof ought to stand, subject to the deduction of the dividends received.

His Honour Sir G. ROSE : —

Messrs. *Williams & Co.*, at the time of the bankruptcy, in which this petition is presented, were, and now are, the holders, for valuable consideration, of a bill of exchange, on which, amongst others, are two several indorsements; the one that of a firm of *Barrow & Co.*, and the other that of an individual, *George Geddes*. The

firm of *Barrow & Co.* consist of *Thomas Barrow* and *George Geddes*, and carry on the business of commission agents at Manchester. *George Geddes* is the same individual trader who is included in the firm of *Barrow & Co.*, and carries on a distinct business, as cotton spinner, at Stockport. (a)

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Barrow and *Geddes* have both become bankrupts, whether under a joint commission against them both, or under distinct commissions against them separately, is altogether immaterial, for the question is not at all influenced by the form of the commission; it is one merely of administration of assets, which in bankruptcy are, — with an exception for this purpose unnecessary to be noticed, — always administered according to the rules of a court of equity, and an equitable administration of assets, is not at all affected by the mode in which the insolvency has been declared or is in prosecution; whether under a joint commission against all of a firm, or under several commissions against the component members of it, — the principle is the same.

Williams & Co., when they received this bill, were, it is admitted, ignorant that *George Geddes* was included in the firm of *Barrow & Co.*; a circumstance which has been considered material in the cases where the question of two proofs upon a bill of exchange has been raised. And the point upon which, from a difference of opinion in the Court, our judgment has been deferred till to-day, is simply this: Have Messrs. *Williams & Co.* a right to prove against the joint estate of *Barrow* and *Geddes* in respect of the indorsement *Barrow & Co.*, and also against the separate estate of *Geddes*, in respect of his separate indorsement? Now here it must be understood, that there is no dispute, that a holder of a bill can

(a) Under the firm of *Geddes* and Co.

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prove against every name upon it until he shall have received twenty shillings in the pound : that there is no doubt as to the effect of the contract either in law or in equity ; that the contract, as in law so in equity, binds both *Barrow* and *Geddes* jointly, and *Geddes* separately ; but the difference between the two branches of jurisprudence is this, that the *law* looks at the contract, as one to be enforced through the individual contracting parties respectively, without any qualification, either in regard to the state of the fund, or to the claims of other creditors ; but *equity* qualifies the relation of the individual contracting parties, by a convenient attention to the remedies of other creditors of the same debtor, and by substituting the remedy against the assets for the claim on the party, and, assuming that there are many other claimants against the same insolvent, it modifies the rights of creditor and debtor, by operation against the estate instead of the individual. The rule appears to me to be not an arbitrary rule, in the sense in which that appears to be understood, but obviously the result of this principle.

It is too obvious to require a remark, that Messrs. *Williams & Co.*, if they had thought fit, might have brought an action against *Barrow* and *Geddes*, or against *Geddes* simply ; they might have taken execution against the joint property of *Barrow* and *Geddes*, and the separate property of *Barrow*, and the separate property of *Geddes*. But, in pursuing this, their remedy by action, they must have taken their chance whether, when they had followed it to execution, they could have got any part of the property of, or any thing beyond the persons of, their debtors ; other plaintiffs might have been before them ; judgments might have been confessed ; voluntary assignments, or other proceedings or events, might have divested the property ; and, in point of fact, this com-

mission, a statutory execution, has done so. They have, therefore, *elected* to come in under this statutory general execution; and, in so doing, have elected to abandon that right which the *law* would have given them. When they tender their proof under the commission, they withdraw their debt voluntarily from the legal operation of the contract, and submit it to be regulated by the principles, upon which assets are administered in bankruptcy.

It has not been denied that it is a universal maxim in the administration of assets in equity, that the separate estate shall be applied in *the first instance* to the separate creditors, the joint estate to the joint creditors. Mark the distinction: equity does not alter the legal contract; it does not say that the joint creditor shall not be paid out of the separate assets of both his debtors; but it says only, that a commission stops the diligence or action of all the creditors, so that they are all to start fair, with the commission, as if all their executions had come to the sheriff at the same time. All the joint creditors shall go *first* to the joint estate, and the separate creditors *first* to the separate estates; and if there be a surplus of the joint estate, it is carried, according to the interest of the partners, to the respective separate estates: if there be a surplus of the separate estates, it is carried to the joint. The *contracts* are not varied, but from *convenience*, applied upon equitable principles to *insolvent* estates, amongst creditors whose equitable executions, by the effect of the bankruptcy, are all of equal date, or contemporaneous; their satisfaction is thus marshalled or arranged *against*, but not *confined to*, the respective estates.

An ordinary partnership debt is in law; and in equity likewise, both joint and several: in law the action lies against one of the two, subject only to a plea in abatement; and by execution you get both joint and several

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property, for the law contemplates *solvency*, proceeds upon solvency, or ample means of satisfaction, either in person or property: but equity in bankruptcy proceeds upon *insolvency*; it does not vary, but only suspends the contract, and that only as long as the assets are inadequate. If there should be a surplus of the separate estates and of the joint estate, the creditor has the same resource to them, as he would have had under his common law execution.

True, say *Williams & Co.*; and upon that principle we are willing to forego the right which the law would have given us against *Barrow & Co.* upon that indorsement; for as to *that*, we have nothing but the joint and separate contract by operation of law; but as to *Geddes*, we have his separate express contract by indorsement: Is that to give us nothing? — Certainly it is to give you something: it gives you the benefit of election, which, without that separate indorsement, you would not have had. But then, say they, *Geddes* is a separate trader, and we are the holders of a *commercial contract*. But is not the answer obvious? What difference can the circumstance that *Geddes* is a separate trader make, unless the law, or equity, or bankruptcy, distinguishes his separate trading stock, as a distinct recognized stock, from his general assets? The law in every mode, either by common law execution, equitable decree, or bankruptcy, looks for the satisfaction of his contracts to his estate, without stopping to distinguish whether it be a debt to his butcher, his baker, his taylor, or incurred in his trading speculation. When you, *Williams & Co.*, took the note, you looked to the joint means of *B. & G.* in the one instance, and the separate means of *G.* in the other, whether trader or not; you got no special contract for the separate trading stock; you looked to all his property, his estate at Hampshire, if he had one,

as well as at Chester; and his other creditors, whether for trade debts or not, did precisely the same.

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It is needless to go through the cases; for not one has been cited, that affects the rule that you cannot prove against both the joint and separate estate of the same individual; or I would put it thus: wherever your common law execution would give you both estates, then, under *the equitable execution in which you all come in together upon insolvency*, you must each take your own estates in the first instance; not exclusively, but in the first instance; subject only to a right of election, which we all know is in the petitioning creditor, as perhaps first execution creditor; and to a right of election, as in this case, where there is express contract.

From the first to the last of Lord *Eldon's* judgments, from that of *ex parte Bigg (a)* down to the last case of *Husband (b)*, this principle is established; and in the last case, if Lord *Eldon* had thought otherwise, he would have directed the proof against the joint and the separate instead of the two separate estates. In the case of *Blackburn*—that there was not the word *Co.* can make no difference: whether the firm be *Blackburn* simply, or *Blackburn and Co.*, the legal result must be precisely the same as to all its incidents.

Let us try all the cases by that of *ex parte Walker (c)*. *A. B. C.* and *D.* are engaged in a joint adventure; *A.* draws on *B.* and *C.*, who happen to be partners in a distinct adventure; and the bill is proved against *A.* and against *B.* and *C.*; the fact of *A.* being in partnership would have prevented a bill drawn by *A.* on *A. B. C.* and *D.* from being proved against *A.* and against *A. B. C.* and *D.*, because it would have given to the creditor twice over payment out of funds in which *A.* was inte-

(a) 2 *Rose*, 37.

(b) 2 *Glyn.* 5.

(c) *Rose*, 441.

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rested; but *A.* was not interested in the property of *C.* and *D.* the acceptors, and *C.* and *D.* were not interested in that of *A.* the drawer; in proving against *A.* the holders came into no competition with *C.* and *D.* In the kind of cases to which I have last adverted, it is mentioned that the proof depends upon the ignorance of the parties, that the firms are connected. In that respect the Court in Bankruptcy was perhaps rather legislating upon the policy of checking accommodation paper, than applying an ingredient which ought in fairness to qualify the express contract of the parties. Upon the whole, therefore, in this case I think there must be election; but as the decision is against the finding of the commissioners, I cannot give costs. Assign them out of the estate. The dividends declared must be deducted.

V. C.
Nov. 26,
1831.

When there is a surplus upon the estate of three which is indebted to two, the creditors of the three are entitled to interest before the surplus is carried to the estate of the two.

Ex parte OGLE. — In the matter of THOMAS HURST, JOHN HURST, and ROBINSON.

THERE were two firms; *Thomas Hurst, John Hurst, and Joseph Robinson*; and *John Hurst and Joseph Robinson*.

The petitioner was a creditor of the three, upon which estate there was a surplus.

The estate of the two were large creditors upon the estate of the three; and the commissioners had admitted this debt to be proved, on behalf of the estate of the two, against the estate of the three, upon the ground that the inability by one partner to prove against another did not apply when all the joint creditors were paid and there was a surplus.

The estate of the two was insufficient to pay more than 10s. in the pound.

See also 357.

This petition prayed that the petitioner and the other creditors of the three might be declared to be entitled to interest before any dividend should be paid upon the debt proved by the two.

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and others.

Sir *Edward Sugden* and Mr. *Lynch* for the petitioner :
—This case is virtually decided by *ex parte Reeve*, 9 *Ves.* 590, in which Lord *Eldon* says, “ It is now therefore clearly settled, that, where there is a partnership and separate debts also, the partnership shall not be admitted a creditor upon any individual, nor any individual upon the partnership, until the creditors of the individual and the creditors of the partnership are satisfied to the extent of 20s. in the pound out of the respective estates; also, that where the separate creditors are paid 20s. in the pound, and there is a surplus, that surplus shall not go immediately to pay interest to the separate creditors, but shall go to make the joint creditors equal with them as to the principal. No decision, however, has gone this length : that, if both the joint and the separate creditors are paid to the extent of 20s. in the pound, upon the payment to that amount to the creditors of each class, a partner shall not be admitted a creditor upon the partnership or upon the individual. But I cannot distinguish the cases; for if the principle is, that neither the partnership nor the individual debtor shall claim in competition with the creditors, and if the creditors are entitled to any interest, the interest is as much a debt as the capital; and that principle will prevent either the partnership or the individual debtor ranking with the other creditors, until all their demand is satisfied; which includes both the principal and interest of their debts.”

Mr. *Rose* and Mr. *Wright*, for the assignees, cited *ex parte Minchin*, 2 *G. & J.* 287; *ex parte Boardman*,

1831. *Cox*, 275; *ex parte Clarke*, 4 *Ves.* 677; *ex parte King*, 17 *Ves.* 116; *ex parte Reid*, 2 *Rose*, 84.

Ex parte
OGLE.
In the matter
of
HURST
and others.
Dec. 7,
1831.

The VICE-CHANCELLOR:— I am unable to discover any difference between this case and *ex parte Reeve*. Here there is not any question between the different creditors, but between the three and the two; and with respect to them, the law is declared in *ex parte Reeve*, from which case I cannot distinguish the present. The order must, therefore, be as prayed.

V. C.
Dec. 27.
1831.

Ex parte CADBY.— In the matter of HUNTER.

THIS petition prayed, that a petitioner resident in Scotland should give security for costs.

The attestation
of the solicitor
to a petition is
as a guarantee
that the petition
is proper; not
a security for
costs.

Mr. *Knight* for the petitioner.

Mr. *Montagu* for the respondent, the original petitioner, resident in Scotland:—

By the order, August 12, 1809, all petitions of a person absent from the kingdom must be signed by the person presenting it on behalf of the person abroad, and the signature must be attested by the solicitor. In *ex parte Cuthbert* and *ex parte Titley*, 1 *Mad.* 79, the Lord Chancellor and the Vice-Chancellor say, that “the order obliging the attorney to attest is to have the pledge and responsibility of a solicitor to the propriety of the application, and to make the attorney, where the case calls for it, pay the costs.” There was, therefore, no necessity for this application.

VICE-CHANCELLOR:— The signature of the solicitor to a petition is not as a security for the costs, but that the petition is a proper one, in like manner as the signature to a bill in chancery by a barrister.

Montagu vs. Ogle.
Dec. 27 1831.

CASES IN BANKRUPTCY.

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Ex parte CRACKLOW.— In the matter of PEET.

post 516.

THE attestation was as follows:

“ Witness,

“ *Henry George Freame*, his solicitor in the matter of this petition, 6, Symond’s Inn.”

V. C.
Dec. 27,
1831.

The attestation must be to the name of the petitioner, and not to the petition.

Mr. *Montagu* objected, that there was no manifestation that the attestation was that of the petitioner: it appeared rather to be a manifestation of the signature of the Lord Chancellor.

Dec. 196.
3 — 617.

The VICE-CHANCELLOR:— I think that the attestation is not sufficient.

Mr. *Koe* for the petition.



Ex parte SHEPLEY.— In the matter of WRIGHT.

THIS was a petition to set aside a sale by assignees, as collusive and improper, on the ground that better terms might have been obtained; or to refer it to the commissioners to ascertain whether or not the sale was improperly conducted, and whether the assignees should be removed.

V. C.
Dec. 27,
1831.

Rule as to serving purchaser, on an application to set aside a sale made by assignees.

When called on, it was objected that the purchaser had not been served.

Mr. *Knight*, in answer to this objection, said, he remembered a case in which a person had bid at a sale of a bankrupt’s goods by assignees, and on an application for an injunction to stop the proceedings under the sale, Sir *John Leach* refused, on the ground of having no jurisdiction; but, on appeal, Lord *Eldon* granted it, on the ground that the purchaser was a clerk to a solicitor con-

1831.

Ex parte
SHEPLEY.
In the matter
of
WRIGHT.

nected with the commission, and that, where the bidder is in any way connected with the commission, the Court has jurisdiction; if not, it has none. In the present case the purchaser was in no way connected with the commission.

VICE-CHANCELLOR:— Although the purchaser himself is not connected with the commission, yet the person who actually bids is so connected as to render it necessary that he should be served.

V. C.
Dec. 29,
1831.

Signing a deed
reciting the
bankruptcy, &c.
is an acquies-
cence in the
validity of the
commission.

Ex parte HALL.

THIS was a petition presented in 1831 to supersede a commission issued in 1815. The facts were stated in the judgment.

VICE-CHANCELLOR:—

This is an application to supersede a commission after a lapse of sixteen years, on the ground of want of form in the affidavit and bond. The objection to the affidavit is, that it was not sworn before a master extraordinary, or other person having jurisdiction; the objection to the bond is, that it is not attested; and there is a third point, the want of a sufficient petitioning creditor's debt. Now, granting these things to be as alleged, the commission would be void at law, but you cannot come here after lying by during so long a period, when you have your remedy at law.

But I shall decide this case upon a different ground. Some years after the issuing of the commission, the bankrupt assigned part of his property by a deed, which recited the commission, and the proceedings under it. This is such an acquiescence as would be a bar to an action at law, and certainly effectually prevents my interfering.

Ex parte LANGLEY.

V. C.
Dec. 29,
1831.

THE respondents gave the following notice : —

“ Take notice, that it is intended to read the evidence of *W. Pym*, given before the commissioners.”

At the hearing, the respondent’s counsel was proceeding to read other parts of the proceedings under the commission, which was objected to.

VICE-CHANCELLOR : — Although *primâ facie* the respondents may have a right to read all the proceedings under the commission, yet the notice, having expressed that particular parts would be read, was equivalent to a waiver of the right to read the rest, according to the maxim, *expressio unius est exclusio alterius*.

Notice of an intention to read certain parts of the proceedings prevents other parts being read.

Ex parte HELSBY.

C. R.
January,
1832.

THE petitioner had been found a bankrupt under a commission which issued on the 8th of November 1831. He surrendered on the 3d of January 1832, when he was called before the commissioners, to be examined. The examination took place on that day, at Liverpool, and lasted until half past one o’clock. He was preparing to go home, after the conclusion of the examination, and, when in the act of leaving the room, he was arrested by the respondent on a writ of *capias utlagatum*, which had issued upon process of outlawry in an action of debt against the petitioner. The officer who served the process upon and arrested him was informed that he had been attending upon the commissioners of bankrupt, by their order, for the purpose of examination,

A bankrupt, when attending commissioners, is protected from arrest on a *capias utlagatum*.

1831.

—
Ex parte
HELSEY.

and that he had not since returned home. The protection indorsed upon the summons was shown to the respondent. But he refused to acknowledge the protection, and conveyed the petitioner, by virtue of the writ, as his prisoner, to Lancaster Castle.

Upon this statement of facts the petition (which was signed by the agent of the petitioner) prayed that he might be discharged out of custody, and that the respondent might pay the costs of the arrest and the petition.

Mr. Koe for the petitioner : —

The petitioner may be considered as a witness, and in such character is entitled, by the rules of the common law, to his discharge. It is not necessary to argue the case on higher grounds, or upon any special protection arising out of the statutes of bankruptcy. Considered in this point of view, he is entitled to the ordinary protection of a witness, *eundo, morando, et redeundo*.

The only distinction which can be attempted is, that he was taken in a process of outlawry; but it is not the privilege or protection of the witness for his own benefit, but of those who require his examination, the creditors. As to the distinction, there is none in substance; for the process of outlawry, in civil suits, is used only to enforce a pecuniary demand, or the performance of a duty. There is no case precisely in point. (a)

Mr. Richards for the respondent : —

It is settled by *ex parte Temple* (b), that crown process is not affected by the protection under the statutes of bankruptcy. The question here raised is, whether it is civil process. If not, it must be admitted that the arrest was proper, and that the party cannot be dis-

(a) *Ex parte Russel*, 1 Rose, 278; 19 Ves. 163.

(b) 2 Rose, 22.

charged. The writ of *capias utlagatum* concludes, “ that the body of the outlaw shall be brought before the Court, to do and receive what the Court shall consider of him in this behalf.”

1831.

—
Ex parte
HELSBY.

An outlaw cannot sue in law or equity. A plea of outlawry prevents all further proceeding. The party is put beyond the pale of the law; his goods are forfeited to the Crown; sometimes they are granted to the creditor; but they are the property of the Crown by forfeiture, in the same manner and right as the goods of felons, as a punishment for not appearing. (a) The outlawry may be reversed under the statute. (b) The writ is not a civil process; and the outlaw, while he remains so, can make no application to any court, or for any purpose. *Somerville v. Watkins*, 14 *East*, 356.

Upon the question of costs it should be observed, that the petition rests upon a ground different from that which is now taken in the argument.

Mr. Koe, in reply, said, that it had been decided (c), that the protection arose out of the statute; but it had also been decided, and in the case of an arrest under an extent at the suit of the Crown, that the bankrupt was entitled to protection and discharge by the rules of the common law applicable to the case of witnesses. (d)

After the argument the case stood over for consideration until the 19th day of January, when the judgment was pronounced.

Jan. 19,
1832.

ERSKINE, C. J., after stating shortly the facts, proceeded as follows:

Two questions arise upon the facts.

(a) ——— *v. Bromley*, 2 *P. ex parte Wright*, 2 *G. & J.*
W. 269. 206.

(b) 4 & 5 *W. & M.* c. 18.

(d) *Ex parte Russell*, 1 *Rose*,

(c) *Price's case*, 3 *V. & B.* 23; 278; 19 *Ves.* 163.

1831.

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Ex parte
HELARY.

1. Whether the protection which is afforded by law to bankrupts attending commissioners for examination extends to proceedings by outlawry?

2. Whether, supposing the arrest to be irregular, the petitioner, being an outlaw, is under disability, or can be heard in a court of justice for any other purpose than to set aside the outlawry?

On both these questions the Court is unanimous in opinion that the arrest was irregular, and that, for the purpose of this petition, the bankrupt, although an outlaw, may be heard.

The protection afforded to bankrupts is twofold. First, Under the general rule of the common law applicable to all persons attending as witnesses before a court, or persons having power to enforce their attendance. In this respect the bankrupt is in the condition of a witness; and the case *ex parte Russell* is an authority for this position. Secondly, The bankrupt has protection by the express words of the statute, 6 Geo. 4, c. 16, s. 117. The words are, “that the bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender, and after surrender during the forty days, and such further time as shall be allowed him for finishing his examination.” And it is further provided, that in case of arrest, “he shall, on producing the summons under the hands of the commissioners to the officer who shall arrest him, and giving such officer copy thereof, be immediately discharged.”

Under this section the law gives a remedy, prefixing a condition, with respect to the performance or nonperformance of which the Court has nothing to do, this application not being grounded on the clause of the statute, but upon the common law. (a)

(a) See *ex parte Donlery*, 7 Ves. 316, and *Simpson's case*, Buck, 424.

The petitioner was arrested at the close of his examination, while he was preparing to go home. He is therefore clearly under the protection of the common law rule applicable to witnesses, unless there is something in the nature of the process under which the arrest took place which overbears the rule.

1881.

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Ex parte
HELSBY.

It was a process of outlawry in a civil suit, for the recovery of a debt.

It is therefore in substance civil process, and the petitioner stands within the circle drawn by the common law; although a person outlawed on criminal process is not protected as a witness, it is otherwise in the case of a person outlawed upon civil process.

But it is urged that the case is beyond the principle, because the process is criminal, and not civil, although the object and end of it is to enforce a debt. But it is sued out at the instance of a creditor; it is sued out to compel the defendant to appear and answer in a civil suit where appearance is sufficient, and to give bail in cases of bailable actions.

The protection of a bankrupt or a witness should not be affected by the mere form of the process. This may be stated on the authority of Lord *Redesdale*, in the case of *re M'Williams*. (a) That was the case of an attachment for not paying money according to an order; and it was held, that every mode by which a creditor can arrest a debtor is within the meaning and protection of the statute and the common law. The doctrine is supported by all the authorities; *ex parte Parker* (b), *King v. Edwards* (c), *Wall v. Atkinson*. (d)

Is it any strain of principle to say, that process of outlawry comes under the same rule? The authority of

(a) 1 S. & L. 169; and see *ex parte Parker*, 3 Ves. 554.

(b) 3 Ves. 554. . (c) 9 B. & C. 652. . (d) 2 Rose, 196.

1831.

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Ex parte
 HELSBY.

Gibbs, C.J., in *Hesse v. Wood* (a), is sufficient to authorize our holding that a *capias utlagatum* is only process in the suit to bring in the party. Between process of outlawry in civil and criminal cases there is a great distinction, marked by the circumstance, that in the one case the party may be a witness, in the other not. This is laid down by *Hale* in his *Pleas of the Crown* (b), where he draws the distinction.

It appears, therefore, to me, and, I believe, to the whole Court, that this was an unlawful arrest, because the petitioner, as a bankrupt, was at the time attending upon an examination.

The second question is, whether the petitioner, being an outlaw, has a *locus standi*, or can be heard in this or any court of justice while the outlawry is in force. It is true, that in cases where the party is proceeding to recover a debt it has been ruled that he cannot be heard. *Britton* says, “*respondra a tout, nul respondra a lui.*” Upon this doctrine it must be admitted, that an outlaw would be estopped in a case where he alone was interested; so it was decided in *Loukes v. Holbeach*. (c) The cases and the principle of decision were considered in the reasons for the judgment given in that case by *Park*, J.; and the result of the reasoning is to shew, that the party in that case was seeking to gain a pecuniary benefit, which was the ground of the decision. We do not propose to interfere with the principle of law established in that case, but admit that a party is estopped by outlawry when he is himself the only person interested. But in this case the question is not personal to the bankrupt only: it affects the court and the creditors.

That a witness is protected after the conclusion of the examination hardly needs authority. On this point

(a) 4 *Taun.* 394.

(b) Vol. ii. p. 299.

(c) 4 *Bing.* 419.

Cameron v. Lightfoot (a) is a very strong case. In bankruptcy it is the privilege, not of the person outlawed, but of the court and the creditors; as in the case of a witness it is the privilege of the suitor. The case of a bankrupt falls under similar principles; and it is an additional reason against such a proceeding, that this was an arrest by a creditor, which is against the whole policy of the bankrupt laws.

1831.

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Ex parte
HELSEY.

Where the bankrupt is brought before the Court by process of law, to make discovery and disclosure for the benefit of all the creditors, it would be inconsistent to suffer one creditor to gain an advantage over all the other creditors, and deprive them of the attendance of the bankrupt on his assignees, to explain his books, his accounts, or his conduct.

The general principle and rule of law is clear. But there are conflicting privileges; and where the benefit of the statutes of bankruptcy would be intercepted by admitting the general rule to apply, which excludes an outlaw, and does not permit him to be heard in court, except for reversing his outlawry, the general rule becomes inapplicable, and the privilege of the bankrupt, or rather of the court and the creditors, prevails over the general rule, or becomes an exception. It is like the privilege of an attorney, which is that of his client; or of a member of parliament, which is that of the public.

The Court is of opinion, that the prayer of the petition should be granted, so far as relates to the bankrupt's discharge; and that the costs should be paid out of the bankrupt's estate.

PELL, J., said that he entertained some doubts on the question. The cases were contradictory. The general

(a) 2 *W. Blac.* 1113.

1831.

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Ex parte
 HELSBY.

rule was, that an outlaw, having treated the process with contempt, could not be heard. In criminal cases it was clear.

If the matter rested upon that statute there was another difficulty. The petition was framed with a view to discharge, under the clause (117) of the statute; and if it had stood solely on that clause, he could not have been discharged, for want of having complied with the condition prescribed. It did not appear that he had shewn his protection, or given or offered a copy of it.

It might perhaps be objected, that this was required only for the purpose of enabling the party to bring an action; but it appeared to be annexed as a condition precedent to the discharge. (a)

If the question is to be decided by the common law right applicable to witnesses, the controversy would lie between the old rule and the distinction in modern times as to outlawry on civil process.

The distinction is taken in *Loukes v. Holbeach* (b), and it runs through all the cases. The ground taken in that judgment was, that the proceeding was solely for the benefit of the party; no other person was directly or indirectly interested. That reason will not apply to the case of a bankrupt, for other persons are interested in his examination. In *Greaves v. D'Acastro* (c) it was said, that "a *capias utlagatum*, at the suit of the party, was to be considered as a private execution, and is only auxiliary to the party." If this be so it stands upon the same footing as other civil process. An outlaw is permitted to give evidence in civil or criminal cases, where the life or liberty of a fellow subject is interested in his testimony; his contumacy ought not to interfere

(a) See *Cloughton v. Legh*, 1 B. & C. 652, 1 D. & R. 831; and *ex parte Leigh*, 1 G. & J. 264-6.

(b) 4 Bing. 419.

(c) *Bunb.* 64.

with this duty; so the heirs of an outlaw may take by descent. Where others would be prejudiced by his disability it becomes inoperative. The same principle we find laid down as law by Lord *Coke* (a), from whose Commentary on *Littleton* it appears that the disability of an outlawry can only be pleaded where a party sues in his own right. He says, “If an executor or administrator sueth any action, *utlary* in the plaintife shall not disable him, because the suit is in *auter droit*.” One thing is singular, that an outlaw, although in a civil suit he is competent to give evidence, yet he is not competent to act as a juror.

1831.

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Ex parte
HELSEBY.

This was before the act of parliament regulating the law as to jurors. I do not understand the distinction. I have expressed my opinion with hesitation, because there is no decided case upon the subject. I adopt, however, the opinion which has been expressed by the Chief Justice, because it is a question of personal liberty; and in the case of an arbitrary and severe rule of law I should be desirous to give the party the benefit of any construction in his favour.

CROSS, J., said, that as the Chief Justice had expressed the unanimous opinion of the Court, he was unwilling to add any observation.

ROSE, J., concurred in opinion that the petitioner should be discharged, but proposed that it should be made part of the order that no action should be brought by the petitioner.

The order was made accordingly; and it was further directed, that the costs (b) should be paid out of the estate. (c)

(a) *Co. Litt.* 197.

(b) See *ex parte Wood*, 18 *Ves.*

(c) Q. Was the assignee before the Court?—See as to the general rule with respect to costs, *ex parte Donlery*, 7 *Ves.* 316.

C. R.
Jan. 21,
1831.

On an application by a mortgagee for leave to bid, the assignees consenting, the costs of the application may be paid out of the estate.

Ex parte SAY. — In the matter of THORNTON.

MR. WOOD applied to the Court that a mortgagee might have leave to bid, and that the costs of the application might be paid out of the proceeds of the sale. He stated, that this had been ordered in *ex parte Marsh*, 1 *Mad.* 148.; but he thought it proper to mention the cases of *ex parte Hammond*, *Buck*, 465, and *ex parte Robinson*, *Mont. & Maca.* 261.

Mr. *Pattison* consented on the part of the assignees.

Per Curiam.

As the assignees consent, and it is for the benefit of the estate that the mortgagee should bid, we make the order as prayed.

16 8 1831 470.

L. C.
LINC. INN,
August 25,
1831.

Ex parte CHUCK. — In the matter of J. C. STARKEY, W. STARKEY, and W. WHITESIDE.

THIS was an appeal by the assignees from the decision of the Vice-Chancellor.

The facts of the case, and the judgment of the Vice-Chancellor, are stated in the report of *ex parte Jennings*, 1 *Mont.* 45.

Mr. *Rose* and Mr. *Wood* for the appellants.

Mr. *Turner* for the respondents (the petitioners before the Vice-Chancellor).

Mr. *Rose's* argument is stated in the reply.

Mont & A 88.

Dec 343.

Mont & A 737.
— 475

The LORD CHANCELLOR observed, that he considered the case of such importance to trade, that he would not decide it without the assistance of two of the judges, to whom he would communicate Mr. *Rose's* argument, in order that he might not call upon him again till the reply.

1831.

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Ex parte
CHUCK.
In the matter
of
STARKEY
and others.

The appeal came on to be heard this day, before the Lord Chancellor, Lord Chief Justice *Tindal*, and Mr. *J. Littledale*.

August 27.

LORD CHANCELLOR:— We are agreed that the case of *Coldwell v. Gregory* (a) must be considered as overruled by *Enderby v. Gilpin*. (b)

Mr. *Wood* for the assignees:—

The decision of the Vice-Chancellor leads to the annihilation of dormant partnerships, and the subtraction of an immense mass of capital from commercial enterprise. Those who embark in dormant partnerships, to whatever extent, are already subjected to an appropriation of their whole property to the debts subsequently contracted by the partnership, but they have an opportunity of watching the conduct of their partners, and if any breach of trust be contemplated, can call for the interference of this Court. The decision of the Vice-Chancellor establishes a principle of far more serious consequence; namely, that if capital to any amount be brought into a partnership by a dormant partner, and the new firm become bankrupt the next week, the whole of that capital must be applied in payment of debts which were contracted by the old firm previously to the introduction

(a) 1 *Pri.* 129.

(b) 2 *B. & C.* 389.

1831.

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CHUCK.In the matter
of
STARKEY
and others.

of the dormant partner, and against which it was impossible for him by any foresight to have protected himself.

In order to ascertain the law of the case, it is important to distinguish between two classes of dormant partners. The one where the party is a partner simply by construction of law, lending money to the firm, and receiving a rate of interest which would be usurious if he were not taken to risk the capital as a partner; the other where the partner, though unknown to the world, has yet an actual interest in the effects of the partnership. Lord *Eldon* takes this distinction in *ex parte Hamper* (a), where he was of opinion that a joint commission against the ostensible and dormant partners would not be good in the first case, although it would in the second. In the principal case, *Whiteside* was, by the terms of the partnership deed, interested in the effects of the partnership at the time of the bankruptcy. The cases, therefore, that apply to the other description of dormant partners are here inapplicable.

The earliest instance of any question being mooted upon the application of the statute of James to the share of dormant partners is in *Binford v. Dommet* (b), more than a century and a half after the passing of the statute. In that case, however, Lord *Alvanley* would not decide the point, but directed an issue, to try whether under the circumstances there was any partnership. Then came the case of *Coldwell v. Gregory*, which is to be considered as overruled by *Enderby v. Gilpin*. But these cases are distinguishable from the principal case. In both there was a dissolution of partnership previously to the bankruptcy. In *Coldwell v. Gregory*, by the agreement upon dissolution, certain articles were specified which were

(a) 17 Ves. 411.

(b) 4 Ves. 756.

to become the property of the retiring partner, who might, therefore, have removed them, instead of leaving them in the possession and reputed ownership of the continuing partner; and in *Enderby v. Gilpin* a year and a half had elapsed since the dissolution, so that there had been ample time for the dormant partner to wind up the concern, and obtain possession of his share. In the principal case the partnership continued up to the time of the bankruptcy. The *Starkeys* and *Whiteside* were joint tenants, and held the partnership property *per my et per tout*; the possession of the *Starkeys* was therefore a possession by title, and the observations of Lord *Redesdale* in *Joy v. Campbell* (a), and the class of cases where trustees become bankrupt, (*Copeman v. Gallant* (b), *ex parte Martin* (c),) which did not apply to the case of *Enderby v. Gilpin*, apply with great force to the principal case. There has been considerable doubt whether in any case of tenancy in common the statute is applicable, *Flyn v. Mathews* (d), *Mucklow v. Mangles* (e); and although the late case of *Kirkby v. Hodgson* (f) appears to have overruled that doubt, yet it must be observed that that case was decided by two of the judges only, and that the legislature appears to have disapproved of the decision (4 Geo. 4. c. 41.) In the principal case the *Starkeys* may also be considered as trustees for *Whiteside*, and thus to have had only a qualified possession of the property.

The principal case is again very distinguishable from *Coldwell v. Gregory*, and *Enderby v. Gilpin*, because in those cases the question arose between a solvent partner, who had retired from the concern, and the assignees, and not between two classes of creditors; and the lean-

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Ex parte
CHUCK.
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(a) 1 Sch. & Lef. 328.

(b) 1 P. Wms. 314.

(c) 2 Rose, 331.

(d) 1 Atk. 105.

(e) 1 Taun. 319.

(f) 1 B. & C. 588.

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—
Ex parte
CHUCK.

In the matter
of

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and others.

ing of the Court would naturally be much stronger against the solvent partner seeking to abstract a portion of those funds which, as far as regarded the creditors subsequent to the dissolution, could only be reached by considering them as part of the remaining partner's property.

Then, if the case be not within the principle, is it within the policy of the statute? That policy contemplated the suppression of fraudulent credit; and it was regarded as a constructive fraud to allow another to obtain credit by the apparent possession of property not really his own. But dormant partners always bring capital into the business, and the substantial benefit usually far exceeds the diminution in value of the other partner's share in the copartnership effects. Besides, where a person continues a partner up to the bankruptcy, he is liable for all the debts contracted, and cannot by any construction be held to contemplate a fraud by establishing a credit, when he suffers in exact proportion to the quantity of debt incurred by his partners. The case is materially different where there has been a dissolution of partnership, and there is no longer a liability.

As to the question of hardship, there may be great hardship in either way. It is now decided, that a dormant partner cannot be pleaded in abatement where there is no notice to the creditor; but in the very last case, *De Mantort v. Saunders (a)*, it was held to have been properly left to the jury to determine whether there was such notice to the creditor, although the partner was what is generally called a dormant partner. We may, therefore, assume, that if the jury had affirmed the notice the creditor would have been bound to proceed, as in

(a) 1 B. & Ad. 398.

bankruptcy, to prove against the ostensible and dormant partners jointly. If, then, in the principal case, any creditors had notice of *Whiteside* being a partner, and, trusting expressly to his property, had advanced money to the partnership, yet the decision of the Vice-Chancellor would sweep away the very property upon which he relied, by converting it into the property of the *Starkeys* only, against which he would be unable to prove as long as there was a single public-house left to form joint property of the three. When we consider the very slight circumstances which may be regarded as constituting notice, the chance of hardship of this description may be held to be equal to that incurred by depriving the separate creditors of the *Starkeys* of part of their fund.

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—
Ex parte
CHUCK.
In the matter
of
STARKEY
and others.

Mr. *Turner* for the respondents : —

The case is one to which the statute is clearly applicable. The words of the act (a) are, “ If any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner.” Here the *Starkeys* were the reputed owners of *Whiteside*’s share in the property, which he left in their order and disposition. No case can be found, except *Coldwell v. Gregory*, where it has been held either that partners have a qualified ownership or are trustees for the dormant partner. The cases of trust are cases where goods are left with another for a particular purpose, as cloth left with a tailor to be made up, and the like. In *Collins v. Forbes* (b), *Ashurst*, J., in delivering the opinion of the Court on a case

(a) 6 Geo. 4, c. 16, s. 72.

(b) 3 T. R. 316.

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which was of that description, says, “It is a very different case from that of a person making a sale of any part of his property, and yet continuing in possession, and taking upon him the disposition of it, with the consent of the vendee.” The latter case is precisely in point here; for the *Starkeys*, after disposing of part of their interest to *Whiteside*, are allowed by him to remain in possession, and take upon themselves the disposition of it. Where a retiring partner suffered the stills and other property of a partnership to remain in the order and disposition of the continuing partners, a deed having been executed by which the use only of the property was vested in the continuing partners, and an annuity to the retiring partner was charged on the property, although it was contended that the possession was under the deed, and upon a trust for the retiring partner, yet the moveable chattels were held to be within the statute. *Horn v. Baker.* (c)

The consequences of reversing the decision of the Vice-Chancellor would be most ruinous to trade. How can any one know whether there be a dormant partner or not? Yet, after dealing with the two, upon the credit of the property of the two, the creditor is to be told, upon a bankruptcy, that, since his debt was contracted, a third party has become interested in that property; and that, as it forms the joint estate of the three, no part of it is applicable to the payment of his debt. If he had been aware of the introduction of *Whiteside* as a partner, he might have brought an action against the *Starkeys*, and compelled payment or a dissolution.

The creditors of the three will have their remedy in either way; but the respondents, who are creditors of

the two only, will be entirely deprived of their dividend. As to the hardship upon the dormant partner, it is no greater hardship than he would be exposed to if his partners ran away with the property.

The cases do not all of them relate to dissolved partnerships. The first case, *Binford v. Dommet*, was not of that description; and although Lord *Alvanley* did not decide that case, but directed an issue, it was only according to the well-known rule of the Court, never to decide a point of law until the state of the facts be first ascertained. The case of the partnership of *Shakeshaft, Stirrup, and Salisbury*, (cited in *ex parte Ruffin* (a), and in *Curtis v. Perry* (b), but not any where reported,) is precisely in point; for there the property of the partners in the country having been sent to their partner in town, it was held, upon the bankruptcy, to be the separate property of the latter.

This case is said to be distinguished by the circumstance of the partnership not having been dissolved; but in *ex parte Dyster* (c), where Lord *Eldon* expressed his doubt as to the decision in *Coldwell v. Gregory*, no distinction was taken as to the partnership being dissolved or not.

The point as to tenancy in common has been expressly decided by *Kirkby v. Hodgson* (d), and it is also decided by *Enderby v. Gilpin*; for it applies equally where there has been a dissolution, until the accounts are wound up.

Mr. *Rose* in reply:—

The respondents rely upon the simple point of order and disposition, and do not meet our case, which rests

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(a) 6 *Ves.* 123.

(b) 6 *Ves.* 743.

(c) 2 *Rose*, 256.

(d) 1 *B. & C.* 588.

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upon the administration of estates in bankruptcy. It is put in argument, that if the respondents had been aware of the introduction of a dormant partner, they might have brought an action against the *Starkeys*; but the original petition before the Vice-Chancellor admits that *Jennings*, the principal creditor of the *Starkeys*, was aware of the new partnership.

The case of *Shakeshaft, Stirrup, and Salisbury* is reported upon another point, in 1 *Cox*, 442; and it there appears, that the house in town was entirely a separate concern from that in the country, and carried on by different partners; it amounts, therefore, to no more than the common case of order and disposition. But our position is, not simply that all the cases turn upon a dissolution of partnership having taken place, but also that they are all of them cases of a solvent partner trying his right against the assignees, and not of a contest between two different classes of creditors. The creditors of the solvent partner, in such a case, were not interested, as he was enabled to pay them out of his own property, even if his share of the capital should be swept away by the operation of the statute. *Ex parte Dyster* was precisely the case of a solvent partner where the partnership itself was illegal, *Dyster* being a broker of the city of London, and by his bond precluded from carrying on the business of the partnership, which was that of drysalters.

The inconveniences of the Vice-Chancellor's decision are most formidable, when we consider the enormous amount of capital employed in dormant partnerships. The question of notoriety is one of great difficulty. How, for instance, can *Jennings* claim, who was aware of the formation of the new partnership? The very circumstance of the original petitioner's being entitled

under a joint commission against the three is an answer to it. The validity of the jurisdiction depends upon there being a good commission under which the application is made; but if the whole property of the partnership is to be regarded as belonging to the *Starkeys*, there is no property upon which the joint commission can be founded. Then how can the property be administered under this commission? *Ex parte Hamper*. (a) Can it be denied, that if a creditor of the three had brought his action, including *Whiteside*, he would have had execution against the three?

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The LORD CHANCELLOR. — The practice of dormant partnerships is a fruit of the usury laws; the dormant partner has no interest in the property.

Mr. Rose : —

But here, by the deed, *Whiteside* does take an express interest in the property.

The case of *ex parte Enderby* is not only the case of a solvent partner, but one where there was considerable laches on the part of the plaintiff; and the decision was on the same principle as if he had never been a partner at all. Our case is one between the creditors, and not in any respect similar to those in which an action of trover is brought by the partner himself.

The possession of the *Starkeys* is a possession with title, and it is also a qualified possession.

It has been repeatedly held, that in all cases of agent or factor the statute does not apply. If, then, the *Starkeys* can be regarded as the agents of *Whiteside*, that will displace the argument on the statute. Such could not be the case in *Enderby v. Gilpin*, where the partnership was at an end.

(a) 17 Ves. 411.

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Again, if there be possession with property, or a trust, the statute is inapplicable. Look at the partnership deed, which is expressly made “upon mutual trust and confidence.” The ordinary definition of partners is, that they act as the agents of each other; but here the express agreement is, that the two are to carry on the business for the benefit of the third. If there be no property, it is agency; if the agency be connected with property, it is a trust. Can the possession of the *Starkeys* be distinguished from that of *Whiteside*? Or if it can, must not their possession be either as agents or trustees? The express agreement is, that at the termination of the partnership the property shall be taken to be *Whiteside's* to the extent of 24,000*l.* Here the bankruptcy has determined the partnership, and *Whiteside* has acquired an express lien, which cannot be displaced by the creditors of the *Starkeys*. If the law were to give it to the *Starkeys*, yet an equity is raised for *Whiteside* to the extent of 24,000*l.*

There is, then, 1st, a possession coupled with title. 2d, This possession is qualified, as to *Whiteside's* share, being held by the *Starkeys* either as agents or trustees.

This case has stood for judgment from 31st August 1831, and has not yet (March 1832) been delivered.

1 Mont & Al. 221.

2 Deac & L 255.

3 — 132-400-779

1 Mont & Al 66-552-747.

1 Deac 121.

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2 Mont & Al 522.

3 Al & Al 518.

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and SMITH. *Mont & Al 62.*

2 Decy 938.
THIS was a question upon section 56 of 6 Geo. 4,
c. 16. (a)

L. C.
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The settlement upon which the question arises was made on the marriage of *Elizabeth* and *William Smith*. *Edward Gray*, upon the marriage of his daughter *Eliza-*
beth, now the wife of *William Smith*, covenanted to pay immediately 1,000*l.* and 1,300*l.* navy five per cents, both of which sums should be for the absolute benefit of *William Smith*; and he further covenanted, “that he should secure the further sum of 4,000*l.* to the trustees of the settlement, within twelve months after his decease.”

William Smith covenanted to secure an annual sum of 80*l.*, during the joint lives of himself and his wife, “upon trust” that the trustees shall yearly, during the joint lives of *Elizabeth* and *William*, pay 80*l.*, as *Elizabeth*, notwithstanding her intended coverture, and as if she were sole and unmarried, shall from time to time direct or appoint; and, in default of such direction and ap-

(a) The following is the section. “If any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of the commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt; and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive a dividend with the other creditors, not disturbing any former dividend.”

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pointment, &c. that the heirs, executors, administrators, and assigns of him the said *William*, shall and will, on and before the expiration of twelve calendar months next after his decease, well and truly pay or cause to be paid unto the trustees the sum of 4,000*l.*, with interest; and that the trustees shall, during the life of the said *William Wynne Smith*, pay the interest unto *William Wynne Smith* and his assigns, for his and their own proper use; and from and after the decease of the said *William Wynne Smith*, do and shall, during the life of the said *Elizabeth Gray*, in case she shall be then living, pay the interest, dividends, and annual produce unto the said *Elizabeth Gray* and her assigns, for her and their own use and benefit; and after the decease of the survivor of them the said *Elizabeth Gray* and *William Wynne Smith*, upon trust that they the said trustees shall pay, transfer, and assign the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, to, between, and amongst all and every or any of the children or child of the said *Elizabeth Gray* by the said *William Wynne Smith*, in manner herein-after mentioned, (that is to say,) the said trust monies, stocks, funds, and securities to be an interest vested or interests vested in all and every or such one or more exclusively of the other or others of such child or children, or their or any of their issue born in the lifetime of the said *Elizabeth Gray* and *William Wynne Smith*, or in the lifetime of the survivor of them, and to be paid, transferred, and assigned to him or them respectively on or at such ages, days, or times, but not a remoter period than twenty-one years, to be computed from the decease of the survivor of them the said *Elizabeth Gray* and *William Wynne Smith*; and if there shall be more than one such child or other issue, in such shares and proportions, charged with such annual

sums of money, and subject to such limitations over for the benefit of the said children or issue, or some or one of them, with such provisions for their respective maintenance and education, upon such conditions, with such restrictions, and in such manner as the said *Elizabeth Gray* and *William Wynne Smith* shall, during their joint lives, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by them respectively sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time direct and appoint; and in default, and until such joint direction or appointment, then as the survivor of them the said *Elizabeth Gray* and *William Wynne Smith*, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, so to be by him or her sealed and delivered, and so to be attested as herein-before is mentioned, or by his or her last will and testament in writing, or any codicil or codicils thereto, to be by him or her signed and published in the presence of and attested by the like number of credible witnesses, shall from time to time direct or appoint; and in default of and until such last-mentioned direction or appointment, and so far as no such last-mentioned direction or appointment shall extend, do and shall stand and be possessed of the said trust monies, stocks, funds, and securities, and the interest, dividend, and annual produce thereof, in trust for all and every the children and child of the said *Elizabeth Gray* by the said *William Wynne Smith*, who, being a son or sons, shall attain the age of twenty-one years, or who, being a daughter or daughters, shall attain that age or marry, to be divided between or among them (if more than one) in equal shares, and in case there shall be but one such child, then the whole to be in trust for that one child: Provided that, in default of direction or appoint-

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ment, the trustees shall, after the decease of the survivor of them the said *Elizabeth Gray* and *William Wynne Smith*, and during the minority or respective minorities of any child or children of the said intended marriage, for whom a portion or portions is or are intended to be hereby provided as aforesaid, and whose portion or portions shall not then be vested, pay and apply for or towards the maintenance and education, or otherwise for the benefit of any such child or children, all or any part of the interest, dividends, and annual produce of his, her, or their presumptive portion or portions under the trusts aforesaid ; and also that it shall be lawful for the said *Thomas Tindal* and *Richard Bird*, and the survivor of them, and the executors, administrators, and assigns of such survivor, after the decease of the survivor of them the said *Elizabeth Gray* and *William Wynne Smith*, or in the lifetime of them or of the survivor of them, with their, his, or her consent in writing, to pay or apply, for or towards the placing out in the world to any trade, employment, or profession, or as apprentice or clerk, or otherwise, for the advancement, benefit, or preferment of any son of the said *Elizabeth Gray* by the said *William Wynne Smith*, who shall then be presumptively entitled under the trusts aforesaid : And it is hereby further agreed and declared, between and by the said parties to these presents, that if no child or other issue of the said *Elizabeth Gray* by the said *William Wynne Smith* shall, under or by virtue of the trusts herein-before declared, become entitled to the said trust monies, stocks, funds, and securities, then and in such case they the said trustees do and shall, after such failure of issue of them the said *Elizabeth Gray* and *William Wynne Smith*, as herein-before is mentioned, pay, transfer, and assign the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, or so much thereof respec-

tively as shall remain after answering the trusts and purposes aforesaid, unto the survivor of them the said *Elizabeth Gray* and *William Wynne Smith*, his or her executors, administrators, and assigns, for his or her and their own proper use and benefit: Provided also, that the provision hereby made for the said *Elizabeth Gray* is and in full satisfaction and bar of her dower."

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All the covenants to be performed by *Edward Gray* were performed during his life, and the 4,000*l.* was duly paid by his executors soon after his death.

Commission of bankrupt issued against *W. Smith*. The trustees applied to prove the value of the 4,000*l.* covenanted to be paid by the executors of *W. Smith* within twelve months after his death. The proof was rejected by the commissioners. Their decision was reversed by his Honor the Vice-Chancellor (1 *Mont. & Mac.* 415). The decision of his Honour was reversed by Lord *Lyndhurst* (1 *Mont. & Mac.* 422). This was a petition to Lord *Brougham* to rehear the order made by Lord *Lyndhurst*.

Mr. *Montagu* and Mr. *Parker* for the petition :—

The objections are, 1st, this is not within the meaning of the act a debt contracted; 2d, the contingency is too remote.

As to the first objection, that this is not a debt contracted, the words are, "If any bankrupt shall have contracted any debt payable upon a contingency which shall not have happened before the issuing of the commission."

The meaning of these words, according to their common usage, and as explained by Mr. Justice *Burrough* in *Bire v. Moreau*, 4 *Bingh.* 59, is "a contract upon a contingency." The section does not apply to tort, or to costs, because they are not by contract, but *in invitum*,

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Bire v. Moreau, 4 Bing. 59 ; or to unliquidated damages, *Atwood v. Partridge*, 4 Bing. 210 ; *Faber v. Young*, 3 B. & A. 529.

It does apply to a contract on a contingency which is capable of being ascertained, as a sum certain depending upon the life of an individual. It is decided in *ex parte Grundy*, 1 M. & M. 290, that a bond and covenant of this nature gives a right of proof. In that case, by an indenture bearing date the 18th day of February 1772, and made on the marriage of *George Russell* (the bankrupt) and *Sarah* his wife, *George Russell* covenanted, in consideration of the then intended marriage, and of 2,000*l.* (the amount of his wife's portion), that in case his wife or any issue of the marriage should survive him, he, *George Russell*, his executors or administrators, should, immediately upon his decease, pay to the trustees the sum of 2,000*l.*, amongst other trusts, upon trust that, in case there should be any child or issue of the marriage living at the time of the death of the survivor of the said *George Russell* and *Sarah* his wife, the trustees should pay the said sum of 2,000*l.* to and amongst such children equally, and that each part or share should become vested and payable at twenty-one or marriage. *Mr. Russell* also executed a bond of the same date in the penal sum of 4,000*l.* for the performance of the covenants contained in the marriage settlement.

When this case was argued before Lord *Lyndhurst*, it was said that the present case differed from *ex parte Grundy*, as “in *ex parte Grundy* there was a bond and a strict legal debt. In the present case no debt has been contracted.” But there is not any weight in this reasoning, as debt lies upon a covenant for a sum certain, and in neither case could any action be maintained until after the death of the covenanter, and after the bankruptcy.

It is, therefore, a debt contracted within the words used in the statute : but, if the words were not clear, the intention of the statute would remove all doubt ; for,

First, This is a remedial statute ; and must be so construed as to suppress the evil and advance the remedy. The nature of the evil has been explained by various Chancellors and Judges. In *ex parte Greenway*, A.D. 1740, 1 *Atk.* 113, this was a petition by the wife of the bankrupt to prove on a similar bond. The Lord Chancellor said, “ The question is, whether this is not a debt become due before the estate is distributed ; and it would be the hardest case in the world, if such a person should not be admitted a creditor before the estate is divided away. The penalty in an obligation is *debitum in presenti*, and the condition only suspends it ; so that it is looked upon as a debt from the time of the execution of the bond. There are a great variety of determinations in the books ; and, therefore, I desire that one counsel of a side may speak to it on the next day of petitions, unless the creditors, at a meeting for the purpose, will agree to give a sum of money to this poor woman, in lieu of her share upon the dividend of the bankrupt’s effects.”

On a future day it was stated to have been agreed to let in the wife of the bankrupt as a creditor for 150*l.* half of the bond debt only, and that it was acquiesced under by the petitioner. The Lord Chancellor : — “ I am very glad you have compromised it.”

In *ex parte Groome*, 1744, 1 *Atk.* 115, on articles previous to the marriage of the petitioner, the husband covenants to leave his wife 600*l.* on the contingency of surviving him. A commission of bankruptcy is taken out against the husband, who dies before any dividend is made : the petitioner attempted to prove the 600*l.* as a debt before the commissioners, but they refused, and

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therefore applies now by petition to be admitted a creditor for the same. The LORD CHANCELLOR said, These are sometimes cases of value: more often cases of hardship and compassion. It were to be wished that they were provided for by act of parliament, and I hope some gentleman who hears me will consider how to rectify this by some future statute. The case of *Groome* may have hardships, and I am sorry for it; but as the law now stands, I cannot determine otherwise. I hope, however, as I said before, that some gentleman will think of a clause, by way of amendment, to this last Bankrupt Act, which may remedy and settle this for the future.

In *ex parte Barker*, 9 Ves. 110, upon the marriage of the petitioner with *Hannah Hornby*, *Joseph* and *William Hornby*, by their joint and several bond, became bound in 2,000*l.*, with a condition to be void, if, within three calendar months after the decease of the obligors or the survivor, the executors should pay 1,000*l.*

There are various other cases in which the nature of the evil intended to be remedied by this statute appears. In *Mayer v. Steward*, 4 Burr, 2439, cited 8 East, 516, the Court says, “It is a hardship to leave a bankrupt liable to covenants, when an act of law has divested him of the power of performing them.”

In *Wyllie v. Wilkes*, Doug. 519, Lord Mansfield says, “It is to be lamented that so large a class of creditors as annuitants are, should be left without any express provision in the bankrupt laws. It is hard upon them that they should be excluded from proving under the commission, (when, perhaps, the other creditors may receive fifteen shillings in the pound under it,) and should be left only to a fruitless remedy against the bankrupt. It is hard also upon an honest bankrupt, who has given up his all to his creditors, that he still should continue

answerable for debts which he has nothing to satisfy. This is a great defect and chasm. It is a pity that the legislature should be silent, and should force the Courts, in order to attain the ends of justice, to invent legal subtleties which do not come up to the common understanding of mankind."

In *Cowley v. Dunlop*, A.D. 1797, 7 *Ter. Rep.* 565, *Lawrence, J.*, says, "In addition to these reasons, it appears to me, that a contrary doctrine would militate against the design of the bankrupt laws, which is to set fair traders free from the engagements they may have made previous to their bankruptcies. It is clear that a bankrupt, who has acted most fairly, may, in a variety of instances, still remain liable on contracts made before his bankruptcy."

In *Bamford v. Burrell*, 2 *B. & P.* 1, *Eyre, C. J.*, says, "I was much struck with the apparent injustice of excluding the proof of debts accrued subsequent to the act of bankruptcy, and thus allowing the few creditors who existed, when the act of bankruptcy was committed, to sweep away all the effects acquired since that time, to the prejudice of those very persons by whom they had probably been furnished. Besides, the person of the bankrupt himself, after the surrender of all his property, might still remain liable to the majority of the creditors. I may find myself obliged to say, that the rule which has been adopted must be adhered to; and that it is for the legislature, not for the Court, to make an alteration."

The nature of the evil cannot, therefore, be mistaken. It was that in certain debts, as annuities, and on marriage contracts, the creditors were deprived of their share of the dividend, and the debtors remained liable to pay, without the means of payment. To remedy these evils, of the creditor being injured, and the debtor persecuted, this act passed; and the Court will so construe it as to

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suppress the evil and advance the remedy. The nature of the evil is obvious, and the words are sufficient to remedy it; and, even if they were not sufficient, the Court, knowing the evil, would, if possible, extend the construction of the words so as to meet the evil. In the *Dean of York v. Middleburgh*, 2 Y. & J. 215, the Lord Chief Baron says, “It is by no means unusual, in construing a statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief, where the statute is remedial.”

This, however, is not the only reason why the Court will construe the statute to apply to the present case; for, secondly, without such construction, the section will be inoperative, contrary to the established rule of construction, that a meaning must, if possible, be given to every clause, and to every word in every clause, “*Ut res magis valeat quam pereat.*” (*Ex parte Burgess*, 2 G. & J. 193.)

The provisions made by the statute for the proof of debts not immediately payable are, section 51, which applies to “*Debitum in presenti, solvendum in futuro;*” section 52, to sureties; section 53, to bottomree and respondentia; sections 54 and 55, to annuities; and section 56, to contingent debts. Unless, therefore, this clause applies to the cases of marriage covenants, it will either be wholly inoperative, or must be confined to guarantees, in direct opposition to another known rule of construction, that words used in a general sense are not unnecessarily to be limited to a particular case.

As to the second objection, that the contingency is incapable of valuation, we admit that, if the computation is impossible, the clause does not apply; because it is a known rule in the construction of statutes, that when a consequence from the use of words is unrea-

sonable, the statute must be expounded upon the supposition that the consequence was not foreseen by the legislature. “*Lex neminem cogit ad impossibilia.*” But there is not any impossibility in the present case, which is illustrated by the case which has been this moment decided. In that case, the contingencies were incapable of valuation. (a) Who could estimate the probability?

But, in the present case, there is not any difficulty: it is the simple question upon the contingency of the husband’s dying before the wife, with or without children.

In *ex parte Davis*, (*ante*, 297,) the Lord Chief Justice said, “The act intended that such contingencies should be proved as are capable of calculation: which, in the present case, they are not.” To the same effect Lord *Ellenborough*, in the case of the overseers of *St. Martin v. Warren*, 1 B. & A. 495, in a question upon a bastardy bond, said, “The case of an annuity is an exception to the general rule. There, indeed, the courts have admitted the amount of the contingent debt to be valued and proved: but there you only estimate the duration of life; here the expences for which the party is liable may vary, in consequence of the sickness of the child. The contingency here is not only the duration of life, but on the continuance of health. It is subjected to every accident of human life, and is the most precarious and uncertain event possible. How, then, could its value be so estimated as to be proved under the commission?”

Although it is admitted that the law does not apply to cases where the computation is impossible, it must not, therefore, be supposed that the difficulty of computation

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is in this case a reason against the admission of the proof.

The disposition of the Court will be to encounter, not to shrink from, the difficulty. It will not abandon the suitors, until it is satisfied that the computation is impossible: as was virtually said by Lord *Ellenborough* in *Bingham v. Serle*, 5 *East*. 541, where his Lordship declined to act from the impossibility of doing justice. His Lordship's words are, "If I should assess a compensation upon a supposition that the exigency will terminate immediately, I may give far too little: if I calculate that it will last to a very distant period, I may give greatly beyond the mark. If I divide the difference, I place myself in the medium only of two extremes of similar injustice, but still I am not morally sure of doing justice, or any thing like justice, only I have a chance of doing less injustice than if I adopted either extreme."

But, in the present case, there not only is not any impossibility, but there is not any difficulty. There is not an actuary in any of the insurance offices, who would hesitate in answering the question, *What is the value of the interest of a wife of the age of 42, if she survive her husband, of the age of 50.* Our faculties are not so limited as not to be capable of subduing this difficulty: we can estimate the value of annuities and of contingencies far more remote and complicated than this contingency, which is the mere contingency in every marriage settlement, and which a court of equity would not, for a moment, hear a trustee say that he had not performed, because it was attended with intricacies which he could not comprehend or subdue. The difficulties of computation must have been foreseen by the legislature, or the clause would have been confined to the right of the wife surviving her husband without issue.

Mr. *Pepys* and Mr. *Rolfe* for the respondents.

The objections, as anticipated, are two: 1st, That this is not a debt contracted; and, 2dly, That the contingency is beyond calculation.

As to the first point, it is to be observed, that the sum sought to be proved is one which *the bankrupt* never could have been called on to pay, because it was not payable till after his decease. It could only affect his assets after his death; but the administration of the assets of a deceased bankrupt, acquired probably long after he has obtained a certificate, cannot have been within the scope of the bankrupt laws. A covenant that a person's executors shall pay is, in truth, a mere charge on the assets: it is like a covenant *to leave*, (*Lee v. D'Aranda*, 1 *Ves.* 1,) and can create no debt, either from the covenanter or his executor. *Perrot v. Austin*, *Cro. Eliz.* 232.

(Mr. Justice *Littledale* here referred to the case of *Plumer v. Marchant*, 3 *Bur.* 1380, which was an action by a specialty creditor against an administrator. The administrator claimed to retain in discharge of a covenant which the intestate had entered into with the defendant by his marriage settlement, covenanting that he would by his will, or that his executors or administrators should within six months of his decease, pay to defendant 700*l.* upon certain trusts; and, on a plea of *plene administravit*, the Court held that the administrator was entitled to retain.)

In that case, however, it appears by the report that the intestate had bound himself in a penalty, so that there was a clear *debt*. Besides, the defendant would, as was noticed in the argument of that case, certainly have been entitled to pay the covenanter, if he had been a different person from himself, at any time after the

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intestate's decease; therefore, being himself the covenantor, he had a right to retain. Lord *Mansfield*, in his judgment, states that the case in *Croke* is reported with a query; but the query, it is to be observed, refers to another point.

In the principal case, the bankrupt could not have satisfied his covenant by a payment in his lifetime; if he had made such payment, and the trustees had misapplied the money, the bankrupt's estate, at his decease, (supposing him not to have become bankrupt,) must have made it good; his executor could not have pleaded *solvit ad diem*.

(C. J. *Tindal* : — But he might have pleaded *accord and satisfaction*.)

That might have been a good *legal* defence; but, in order to make such a defence available in equity, it must have been shewn, that there had been *accord* with the cestuique trust as well as the trustee, which in this case would have been impossible.

But, secondly, even if there be a debt, it is a debt not capable of proof, from the impossibility of estimating the contingency.

At present there is no issue. If there shall be no issue, and the bankrupt shall survive his wife, the bankrupt will himself become the party entitled beneficially under the covenant, and consequently nothing will be payable.

The question, therefore, Whether any thing will eventually be payable, depends on the question, Whether there will be issue of a particular marriage. The chances on such a subject are evidently beyond the powers of calculation. The probability of life or death, the chances of survivorship, the relative values of different ages — these are all matters of calculation, deducible with tolerable accuracy from past experience,

as set forth in the tables; but there exists no data on which to calculate the probability of a person having issue.

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It is said the covenant is absolute, to pay at all events; and that the question, who will become beneficially interested, need not enter into the calculation; that, it is said, will be merely a question for the trustees, when they come to execute the trust; but such is not the rule: if the equitable interest is contingent, that was, before the late statute, sufficient to prevent a proof, *ex parte Taaffe*, 1 Gl. & Jam. 110; and consequently now, if the equitable right be dependent on a contingency incapable of calculation, no proof can be allowed.

The decision in the case of *ex parte Davis (a)*, which is the same, as to the appropriation of the fund, as the present case, has settled the question; for the decision was not solely upon the ground of the impossibility of computation, from the absurd conditions with which the settlement was clogged, but from the same impossibility existing as to the calculation of the wife surviving, with or without any and what number of children.

In *ex parte Grundy*, the contingency had actually taken place, so that all difficulty of computation was at an end.

The difficulties, however, are not confined to the calculation of the contingencies, for the form of proof is attended with as much difficulty; for, as the children may be numerous, the proof must be made by each of the adults, and by or on behalf of each of the infants; and, even if the proof is made, the funds must accumulate, and the estate, instead of being divided amongst the creditors, must be reserved until the person ultimately entitled is ascertained, by the termination of the

(a) *Ante*, 297.

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contingency, unless it is to be supposed that the legislature intended that a sum should be paid to a person who might never be entitled to it.

Mr. *Montagu* in reply : —

With respect to the supposed difficulty of calculation, it is nothing but supposition. There is not an actuary who would, for a moment, hesitate in making the computation; and although in *ex parte Grundy*, the contingency was terminated by the death of the bankrupt, his death did not render the debt proveable, although it removed all difficulty as to the computation of the amount to be proved. This appears from the words of the statute. As to the imaginary difficulty of proof, the proper person to prove is the trustee, in whom the legal right vests, subject to any interposition which the Court may think proper, to protect the equitable interests of the *cestui que* trusts. *Ex parte Dubois*, 1 *Cox*, 312; and, as to the number of persons beneficially interested, there have been cases where the claimants are far more numerous, and no difficulty has ever been found to exist.

This case has stood since August 1831 for judgment.

C. R.
 Feb. 16,
 1832.

Distance of
 eighty miles
 not a cause for
 non-attendance
 of petitioning
 creditors.

Ex parte COX.

THE petitioners were the petitioning creditors against a bankrupt, the greater part of whose creditors resided at Devonport, at which place it was proposed to work the fiat against him. The prayer of the petition was, that the personal attendance of the petitioning creditors at the opening of the fiat might be dispensed with, upon their making an affidavit of their debt.

The affidavit of the solicitor employed by the peti-

Mont v. 33

tioners stated, that they resided at Beaminster, in the county of Dorset; that they were engaged in a large manufacturing business; that Beaminster was upwards of eighty miles distance from Devonport, and that, to the best of his belief, there was no direct public conveyance between the two places.

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Mr. *H. N. Coleridge*, for the petition, cited *in re Graham, Buck*, 47.

Sir G. ROSE was of opinion, that there existed no reason why the petitioning creditor should be compelled to travel such a distance, if his affidavit satisfied the commissioners of the validity of the debt. He never remembered such an application being refused, except in *ex parte Williamson*, 1 J. & W. 240, where the excuse was, that the commission was to be opened at a place forty-seven miles distant from the petitioners residence.

The Chief Judge, Sir A. PELL, and Sir J. CROSS, however, were of opinion, that the prayer could not be granted, on the ground that the general order (a) ought not to be dispensed with, except for good reasons; that if the question was to be decided on distance alone, it would be difficult to fix what precise distance should authorize the dispensation; and that, although the affidavit stated that there was no direct public conveyance from Beaminster to Devonport, it did not state that there was no such conveyance within a short distance of the former place.

Nov. 26,
1798.

Petition dismissed.

(a) Q. 1. Was not this order made in consequence of the case of *ex parte Bowes*, 4 Ves. jun. 168? Q. 2. Has it not, except in peculiar cases, been usual to save the expense to the estate of the peti-

V. C.
Dec. 26,
1831.

Ex parte LOWE and CUTTILL.—In the matter of AARON.

IN November 1827, a commission of bankrupt issued against *Aaron*, under which *J. Husband* senior and *J. Husband* junior were chosen assignees.

In 1828, the bankrupt obtained his certificate.

In November 1831, *Aaron* took the benefit of the insolvent debtors' act, under which the petitioners were elected assignees.

In 1831, a first and final dividend of 9s. 5d. was declared: the sum to be divided amounted to 1,637l. 10s.; which consisted of

£	s.	d.	
1,293	17	0	proceeds of bankrupts estate.
320	0	0	{ interest charged at 20 per cent. on the sum of 1600l.
23	13	0	{ interest at 5 per cent. on the sum of 500l.
<hr/> £1,637 10 0 <hr/>			

This petition by the assignees under the insolvent act, after having stated, amongst other things, that many sums had been allowed to Messrs. *Husbands*, upon auditing the accounts, which ought not to have been allowed to them, proceeded as follows:—

“That your petitioners said solicitor objected to such

tioning creditor's attendance, be incurred by his attendance, which, when at a great distance, must be excessive?

Q. 3. Have not these applications been so encouraged as sometimes to give the petitioning creditor the costs of his petition, when less than the costs which would
Q. 4. What are the relative advantages of an affidavit made in striking the docket, and an affidavit made at opening the commission;—neither of them being evidence at law?

allowances ; and that after the same had been made the said commissioners found that the net balance in the hands of the said assignee amounted to the sum of 1,293*l.* 17*s.* ; and they also found that the said assignee had retained the respective sums of 1,600*l.* and 500*l.* in his hands ; but, instead of charging the said assignee in his account with such sum as should be equal to interest at the rate of 20 per cent. *per annum* on the said two sums of 1,600*l.* and 500*l.* for the time during which he the said assignee so retained the same, as said petitioners said solicitor insisted they ought to do, the said commissioners decided that the said assignee was liable to be charged with 20 per cent. only on the gross sum of 1,600*l.*, without regard to the period or time during which he had retained the same in his hands ; and with interest at the rate of 5 per cent. *per annum* on the said sum of 500*l.* from the time the same was alledged to have been received ; and the said commissioners therefore charged him in his said account with 320*l.* for “percentage” on the said sum of 1,600*l.* and 23*l.* 13*s.* for “interest” at the rate of 5 per cent. *per annum* on the said sum of 500*l.*

“ That the said commissioners on such audit did not ascertain what balances had from time to time been in the hands of the said assignee, as directed by the said act of parliament ; and that if they had done so, and had charged the said assignee in his account with such sum as would be equal to interest at the rate of 20 per cent. *per annum* on such balances, a sum of 3,000*l.* and upwards would have been, as your petitioners humbly submit, properly chargeable against the said assignee, instead of the said sums of 320*l.* and 23*l.* 13*s.* ; and which larger sum, with the net balance which the said commissioners found to be in the hands of the said assignee, would have been much more than sufficient to pay

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all the creditors who had proved debts under the said commission, including such debts which your petitioners are advised and insist ought to be expunged, or on which no dividend would, under particular circumstances, be payable.

“That under the circumstances the rate of interest which the said assignee has been charged upon his said account is less than $2\frac{1}{2}$ per cent. per annum upon the monies improperly retained or misapplied by him, and in respect of which he is chargeable with interest at the rate of 20*l.* per annum.”

The petition prayed, “that in respect of the money belonging to the said bankrupt’s estate, which the said *Thomas Husband* the younger hath from time to time had in his hands, or applied improperly, or which has been in the hands of any person or persons by his order for his use, that he is chargeable with interest thereon after the rate of 20 per cent. per annum for the time the same have been so improperly retained or applied, and not with interest at the rate of 20 per cent. only, without regard to time; and that the said commissioners may be directed to review the said accounts, and to charge the said assignee accordingly thereon; and that the said commissioners may also be ordered to review their said allowances, and to order the said bills of costs to be properly taxed, and that the several sums hereinbefore mentioned to have been improperly allowed to the said assignee in his said accounts may be disallowed.”

Upon this petition the following questions arose:

1st. Whether the charges should be a gross sum of 20 per cent., or 20 per cent. *per annum*?

2d. Whether, supposing 20*l.* per annum was chargeable, such charge could be ordered, not upon the petition of a creditor, but of the bankrupt?

3d. Whether the charge extended beyond 6 Geo. 4.?

Mr. *Twiss* and Mr. *Teed* for the petition.

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Mr. *Knight*, Mr. *Montagu*, and Mr. *Jacob*, for the respondent, as a preliminary objection, contended that the petition could not be supported, as the bankrupt could not have any interest, unless the assignee was chargeable with 20 per cent. *per annum*.

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The VICE-CHANCELLOR:—It is unnecessary for me to consider what might be my own speculations as to the probable intention of the legislature with respect to the omission of the words “*per annum*,” because, in fact, they are omitted. I cannot, therefore, consider the section in the same manner when they are omitted as if they had been inserted. It is a penal clause, and, with respect to the penalty, must, according to all rules of construction, be construed strictly. Therefore, I cannot think myself authorized to say that the assignees can be charged with 20 per cent. *per annum*, without which the bankrupts cannot have any interest—

Petition dismissed with costs.

This petition was again argued before the Court of Review, upon the supposition that this Court had jurisdiction to rehear a petition which had been heard by the Vice-Chancellor. The question of jurisdiction had been previously argued, and will be reported, but is not inserted in this place, as not being immediately material to the question agitated in this petition.

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Feb. 9,
1832.

Mr. *Twiss* and Mr. *Teed* for the petition : —

That section 104 is not to be confined to one charge of 20 per cent., instead of a charge at the rate of 20 per cent. *per annum*, appears, not only from the words, but from the intention of the act: for, although the

20 per cent.
per annum.

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words *per annum* are not contained in the statute, the insertion was not necessary.

Now as the words are not confined to a charge of 20 per cent., by merely saying, “shall be charged 20 per cent.,” but are, “such sum as shall be equal to interest at the rate of 20 per cent. on all such money for the time during which he shall have so retained or employed the same,” the greater part of this clause must, if it is to be confined to one charge of 20 per cent., be wholly useless, contrary to the established rule of construction, that a statute must be so construed that every word must have a meaning.

And by reference to other clauses of the statute it will appear that the same expression is used where it is clear that an annual computation was intended. (*a*)

And with respect to the intention of the act, unless it is interpreted 20 per cent. *per annum*, it will operate as a bonus to the assignee, who will pay less as the offence increases; which, instead of deterring, will invite him to commit the crime which it is the object of the legislature to prevent.

If it is said that this is a penal statute, and therefore there must be a stricter construction than with respect to any other statute, it is sufficient to say, that all statutes must be so construed as, if possible, to lead to the intent of the legislature: and this, so far from being a penal statute, is a mere civil charge in the nature of liquidated damages: the words of the statute being, “shall be liable to be charged in his accounts.” And in *Stanley v. Wharton*, 9 Price, 301, this distinction is recognized, where the Court says, that the 11 Geo. 2. c. 19. is a remedial and not a penal act, although it gives a double value to a landlord for the aggravation of the

(*a*) See postea, 401.

wrong done to him by a wrongful removal and concealment.

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of

AARON.

Retrospective.
Bankrupt
interested.

That the act is retrospective appears from the wording of the clause, which is not prospective, but says, he shall be charged for the time *during which he shall have so retained or employed the same.*

That the bankrupt is interested in this charge is evident, from the consideration that the only prospect of the bankrupt is the allowance or surplus to which he may be entitled : and, if assignees may risk this, by a speculation with the property, which this statute was intended to protect, the greatest injury must result to the most meritorious description of bankrupts, who, although not the first, are as much the object of legislative protection as the creditors.

Mr. *Montague*, Mr. *Jacob*, and Mr. *Bethel* for the respondent :

We submit :

1st. That the charge ought not to be 20 per cent. *per annum.*

2d. Supposing the charge ought to be 20 per cent. *per annum*, that the charge cannot be extended beyond 6 Geo. 4. c. 16.

3d. Supposing the charge ought to be 20 per cent. *per annum*, that it cannot be ordered upon the petition of the bankrupt.

First. The charge ought not to be 20 per cent. *per annum.*

If the penalty of 20 per cent. *per annum* is to be inflicted, it must be by 6 Geo. 4. c. 16. s. 104., as the 49 Geo. 3. c. 121. s. 4. is repealed by 6 Geo. 4. c. 16. (a)

20 per cent.
per annum.

(a) *Kay v. Goodwin*, 6 Bing. statute to be, to obliterate it as 582, where *Tindal*, C. J., says, completely from the records of "I take the effect of repealing a parliament as if it had never pas-

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But it is not chargeable by the express words of this section, which are, “ That if any assignee shall retain in his hands, or employ for his own benefit, *or knowingly permit any co-assignee so to retain or employ*, any sum to the amount of one hundred pounds or upwards, part of the estate of the bankrupt, *or shall neglect to invest any money in the purchase of exchequer bills, when so directed as aforesaid*, every such assignee shall be liable to be charged in his accounts with such sum as shall be equal to interest at the rate of twenty per cent. on all such money, for the time during which he shall have so retained or employed the same, *or permitted the same to be so retained or employed as aforesaid*, or during which he shall have so neglected to invest the same in the purchase of Exchequer bills, and the commissioners are hereby required to charge every such assignee in his accounts accordingly.” (a)

No doubtful
 words.

In this clause there are not any doubtful words, and it is a rule in the construction of statutes, that *words not doubtful must be construed according to their obvious meaning*.

sed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law. It follows, therefore, that this statute, having been repealed by 6 Geo. 4. the power of enrolling under the 5 Geo. 4. has perished with that act.”

The same doctrine may be found in various cases; and no proceedings can be pursued under a repealed statute, though commenced before the repeal,

unless by special exception.—*Miller’s Case*, 1 *W. Black*, 451.

An act from its passing repeals a former act which ousted clergy for a certain offence, and imposes a new punishment on the same offence from and after its passing: Held that an offence committed before the passing of the new act, but not tried till after, is not liable to be punished under either of the statutes. *Rex v. Mackenzie*, *R. & R. C. C.* 429.

(a) The words in *italics* were not in the former statute, 49 G. 3. c. 121. s. 4.

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est (a), is one of the fundamental maxims in the interpretation of statutes, and, in obedience to this rule, the construction, by all courts, has been uniform.

In *Jones v. Smart*, 1 T. R. 52., Buller, J., says, "A *casus omissus* can in no case be supplied by a court of law, for that were to make laws."

Although the intent of the legislature is to be ascertained, it must not be inferred, if the words will not warrant it. In *Reid v. Sowerby*, 3 Maule and Selwyn, 80. Lord Ellenborough says, "if the act so meant, *quod voluit non dixit*."

By a private act of parliament, entitled "An Act to enable the Norwich Union Society to sue in the name of their secretary, and to be sued in the names of their directors, treasurer, and secretary," that society were empowered to commence and prosecute all actions and suits in the name of their secretary as the nominal plaintiff. Held, that it did not empower the secretary to sue out a commission of bankrupt, on behalf of the society, against a person indebted to them as a society. *Guthrie v. Fisk*, 5 D. & R. 24. S. C. 3. B. & C. 178. Unless, says the court, "we see very clearly that the meaning of the legislature goes beyond the words, we cannot do so" (support the commission). It is a dangerous rule of construction to introduce words not expressed, because they may be supposed to be within the mischief contemplated. The act is entitled, an act to enable the society to sue in the name of their secretary, and to be sued in that and certain other names.

In the *Attorney General v. Jeffreys*, 13 Price, 580, the

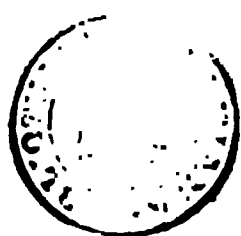
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(a) In *Wingate's Maxims of the Common Law*, Maxim 16, there are various illustrations of this rule.

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Implication by
 6 Geo. 4.

Lord Chief Baron *Alexander* says, “something has been said about the different rules of construing statutes, with reference to their being remedial or penal; that is certainly a distinction of some consequence, where the question of construction comes to a measuring cast; but where the language of an act of parliament is clear and plain, I am bound to give it effect.

“The first observation I desire to make is, that the clause in question has nothing in it, either obscure, equivocal, or ambiguous. All is clear and plain to a common understanding. There is no impossibility, nor even difficulty, in executing it according to the letter.”

If, therefore, the 20 per cent. per annum is chargeable, it must be by implication, either from other words in the statute, or by reference to 49 Geo. 3.

It is said, first, it must be implied that the clause is to be at the rate of 20 per cent. per annum, because the words are not “*shall be charged 20 per cent.*,” but *with such sum as shall be equal to interest at the rate of 20 per cent.*; and if the charge is to be confined to one debt of 20 per cent., all the words, “*with such sum as shall be equal to interest at the rate of 20 per cent.*,” will be inoperative, contrary to the established rule in the construction of statutes, that a meaning must, if possible, be given to every clause, and to every word in every clause. (a)

Admitting that there may be some ambiguity occasioned by these words, it does not follow that the courts are to supply the defect by an arbitrary insertion of words not used by the legislature, which would not be interpreting the law, but legislating; as there is nothing but vague conjecture to warrant the insertion of *per annum*, without any authority to sanction it: and, in-

(a) See *ex parte Burgess*, 2 G. & J. 193.

stead of admitting such an arbitrary interpolation, it would be better to adjudge that nothing was chargeable, because the legislature has omitted to state the rate at which the computation is to be made.

This is the only mode of inferring from the words of the statute that the use of the words "per centum" is to be applied: but there are other words used in the statute which negative the supposition that the charge should be annual; as where there is a simple charge of interest the words per annum are used, unless they are so implied by the use of previous words as to render their use mere repetition; and where the penalty of 20 per cent. per annum is inflicted, a discretion to inflict it (which is not contained in this clause) is given to the court.

In section 55, if the surety for an annuity shall not pay the sum proved, he "may be sued for the accruing payments, with interest thereon at the rate of 4 per cent. per annum."

In section 132 it is enacted, with respect to the payment of the surplus: "but the assignees shall not pay such surplus until all creditors who have proved under the commission shall have received interest upon their debts, to be calculated and paid at the rate and in the order following; (that is to say,) all creditors whose debts are now by law entitled to carry interest, in the event of a surplus, shall first receive interest on such debts at the rate of interest reserved or by law payable thereon, to be calculated from the date of the commission, and after such interest shall have been paid, all other creditors who have proved under the commission shall receive interest on their debts from the date of the commission, at the rate of four pounds per centum."

There was no necessity here to add the words "per

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annum" to the words "per centum," as by the previous words there is a reference to an annual computation.

So too in section 57 the computation of interest refers to an annual computation as follows: "The holder of such bill of exchange or promissory note shall be entitled to prove for interest upon the same, to be calculated by the commissioners to the date of the commission, at such rate as is allowed by the Court of King's Bench in actions upon such bills or notes."

So too in section 51 there is the same specific enactment as to time: "That any person who shall have given credit to the bankrupt upon valuable consideration, for any money or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of five *per cent.*, to be computed from the declaration of a dividend to the time such debt would have become payable, according to the terms upon which it was contracted." (a)

By section 104, 20 per cent. is to be charged, without the commissioners having any discretion to mitigate it; but in other clauses, where the legislature contemplated money remaining for a long period, the words "*per annum*" are used, and a discretion is given to the Judge, as in section 110: if any assignee shall have in his hands any unclaimed dividends, and shall not file a certificate

Sect. 110. Dis-
 cretion as to
 20 per cent.
 per annum.

(a) 49 G 3. c. 121. s. 9.

thereof, "such assignee shall be charged in account with the estate of the bankrupt interest upon such unclaimed dividends, to be computed from the time that such certificate is to be filed, at the rate of five pounds per centum *per annum*, for such time as he shall thenceforth retain the same, and also such further sum as the commissioners shall think fit, not exceeding in the whole twenty pounds per centum *per annum*."

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So, in the insolvent act, 7 Geo. 4. c. 57. s. 36., "I it shall appear to the court or commissioner, upon inquiry, that any assignee shall have wilfully retained in his hands, or otherwise employed for his own benefit, any sum or sums of money, part of or being the produce of such estate and effects (of the insolvent), the said court or commission shall have power and authority to order such assignee to be charged in his accounts with the estate of the prisoner with such sum or sums of money as shall be equal to the amount of interest, computed at a rate not exceeding 20 *per centum per annum*, for the time or times during which he shall have so retained or employed the same."

With respect to any implication from 49 Geo. 3., it not only does not exist, but the inference is directly opposite, as is explained with respect to this very act, in different decided cases. Implication
from 49 G. 3.

By the 21 Jac. 1. c. 19. s. 2., the being arrested for debt, and lying in prison two months, is an act of bankruptcy from the time of the first arrest. By 5 Geo. 4. c. 98. s. 4. it is enacted, that if any trader having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall, upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, be in prison for twenty-one days; or if any such trader, having been so arrested, committed, or detained, shall

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escape out of prison or custody; every such trader shall be deemed to have thereby committed an act of bankruptcy. By 6 Geo. 4. c. 16. s. 5. it is enacted, that if any such trader, having been arrested, &c., shall, upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention.

In commenting upon this act, in *Moser v. Newman*, 4 M. & P. 338 (a), Mr. Justice *Bosanquet* says, "But, on a review of the former statutes, when we see that words of relation have sometimes been introduced, and sometimes omitted, we must assume that such omission is intentional, particularly as the period of imprisonment by which an act of bankruptcy may be constituted by lying in prison is now limited to the short period of twenty-one days." And in *Higgins v. M'Adam*, 3 Young & Jarvis, 10, the Court says: "I do not know how to insert words of relation in that part of the clause in which the legislature has omitted them. And where in an act of parliament, professedly made for the amendment of laws relating to bankrupts, this omission is found, I think that the Court would be going beyond their province, which is merely that of construction, if they were to supply it: that would be to hold that the legislature meant something which they have not expressed. If the intention of the legislature were other-

(a) And 6 Bing. 556.

wise, it rests with them to make an alteration. The duty of the Court is only to construe and give effect to the enactment as it is passed."

If, however, the inference does exist by reference to 49 Geo. 3., it must be either from the supposition that these important words were omitted by accident, or that they were omitted as surplusage.

With respect to the not very respectful supposition that they were omitted by accident, if we may venture to speculate upon the subject, a slight consideration of the spirit of the statute and the subsequent clauses will shew that it was intentional.

The spirit of the act is, that the assignees shall, as a check upon them, in all cases, pay 20 per cent., and that the amount shall not depend upon the time, as a check to insure the vigilance of the creditors in protecting their own interests.

It was Lord *Eldon's* opinion that the injury which creditors sustained was not so much from the misconduct of the assignees as from their own negligence. In *Wackerbeth v. Powell*, 2 G. & J. 158., Lord *Eldon* says, "I believe it is an observation one may venture to make without the hazard of contradiction, that most creditors who complain owe the grounds of their complaint to the fact that they do not avail themselves of the act of parliament made for their relief."

So too Mr. *Cook*, in his examination before the committee of the House of Commons, says, "If the creditors will not assist the commissioners by exerting themselves, how is it possible to give effect to the law? and what check can be put upon the assignees beyond their own oaths. If the commissioners were properly assisted, the negligence or fraud of the assignees must soon be discovered.

By section 104, therefore, they are chargeable with 20 per cent.; and by section 106, which is a new enact-

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ment, the commissioners at the third meeting must appoint a public meeting not later than six months, to audit the accounts of the assignees, and ascertain what balances have been from time to time in the hands of the assignees :” and by section 107 it is enacted, that a meeting for declaring a dividend shall be held not sooner than four nor later than twelve months.

What reason then is there to suppose that, instead of the alteration having been intentional, the omission of these important words escaped the notice of parliament, and the vigilance of Lord *Eldon*, whose attention must have been directed to it, not only from these opinions, but from his consciousness of the severe operation of the 49 Geo. 3, which he had lamented, in *ex parte Bray*, in which case the assignee had received 346*l.* 4*s.* 3*d.*, which, apprehensive of the solvency of the bank, he retained to the 30th June, but he claimed the sum of 42*l.* 8*s.* 5*d.* for his expenses from London to Bishop Wearmouth : when the Lord Chancellor said, “ Though it is impossible in this case to say that Mr. *Lambert* has not acted meritoriously, and with the best intentions, yet as it appears that he has wilfully retained this sum in his hands, the act is imperative, and he must pay 20*l.* per cent.”

The probability therefore is, that the legislature resolved to alter the law; the mode of alteration being either by giving a discretionary power to the commissioners to charge 20 per cent. per annum, or by making it imperative that they should charge 20 per cent., if the assignees for a day neglected their duties. The latter mode was in this case adopted ; if the first mode had been adopted, the form would not have been permitted to exist as it did exist in *ex parte Bray*, but the penalty would have been left to the discretion of the commissioners, as it has been left in this clause.

Assuming, therefore, that they were not omitted by accident, the reasoning must fail, unless they were omitted as surplusage.

With respect to their omission as surplusage, the present argument and the professional opinion shew that the omission could not have originated in this cause.

To this it will be sufficient to say, in the words of Lord *Lyndhurst*, in *ex parte Burgess*, 2 G. & J. 200: "I cannot think that an enactment of so much importance, and at such direct variance with all the principles of the bankrupt laws, would be made by omitting a description which could not be doubted; and leaving the question involved in the obscurity attendant upon these vague and general words."

In this case, the repealed act of 5 Geo. 4., the words, "and all persons making bricks, or burning lime for sale," &c., are to be found, but were omitted in 6 Geo. 4. c. 16.; but it was contended that these words were included under the words, "goods and commodities," in section 2; but the Lord Chancellor held that he could not include the words of the repealed act under the loose and vague ones of the 6 Geo. 4.

For these reasons we submit that it is clear the legislature did not intend more than it has expressed; but if any doubt is supposed to exist on the subject, an established rule in the construction of statutes will solve this doubt; for it is admitted that penal statutes must, as to the penalty, be construed strictly. Penal clause.

To meet this difficulty, it has been argued, that this is not a penal clause, because the words in the act are, "shall be *liable* to be *charged in his accounts* with," &c., and that according to the case of *Stanly v. Wharton*, 9 Price, it is not a penalty, but merely the assessment of liquidated damages.

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With respect to the liability to be charged in account, it is so far from an alteration of the penal nature of the statute, that it is rather an addition to it, by affording an easier remedy; and so it was considered in *Beresford v. Burt*, 1 C. & P. 373., where Lord *Tenterden* held that the 20 per cent. was not recoverable upon the common count. His judgment was as follows:

“I think, in order to charge a man with interest at 20 per cent., there should be a count framed upon the act. If indeed it applies to the case of an action, and is not merely directory as to what is to be done when the matter is before the commissioners, I should think it a case for 5 per cent. interest. But this interest at 20 per cent. is in the nature of a penalty; and I think you must declare specially, as for a penalty. If the commissioners had settled an account, and charged the defendant with such interest, then the case would have been different. And in *ex parte Goldsmith*, 1 G. & J. 406, it was contended, that as the claim was founded on a penalty, it was applicable only to solvent assignees; and of this opinion was the Vice Chancellor, who says, “I am of opinion that the fourth section, which gives 20 per cent. against the assignee, is meant to apply by way of penalty against a solvent assignee only, and is not meant to prejudice the creditors of a bankrupt assignee; and that the sixth section imposes the penalty upon the bankrupt assignee.” (a) Which doctrine is confirmed in

(a) The sixth section of 49 Geo. 3. c. 135. is to the same effect as section 105 of 6 Geo. 4. c. 16., which is as follows: “That if any assignee indebted to the estate of which he is such assignee, in respect of money so retained or employed by him as aforesaid, become bankrupt, if he shall obtain his certificate it shall only have the effect of freeing his person from arrest and imprisonment; but his future effects (his tools of trade, necessary

Wackerbeth v. Powell, 2 G. & J. 158., where Lord Eldon says, "The fourth section gives authority to the commissioners to charge the assignee, in account, with 20 per cent., in the cases therein mentioned; the sixth section speaks of the case of an assignee who becomes bankrupt; so that the fourth relates to an assignee not becoming bankrupt, and the sixth relates to an assignee becoming a bankrupt. The former of the clauses, looking at the case of an assignee not becoming a bankrupt, charges him with 20 per cent.; the latter, looking to the case of an assignee who has become a bankrupt, does not give a better remedy against the bankrupt, at the suit of the person of whose estate he was assignee, than is given to the other creditors of that person, with this exception only,—that in that case the future effects of the bankrupt, who kept the money in his own hands, instead of paying it out according to the order of the commissioners, are to be liable notwithstanding this commission, but to be liable only with lawful interest for the sum at five per cent.;" and in this very case it is determined that the estate of a deceased assignee is chargeable only with five per cent.

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As to the case of *Stanly v. Wharton*, 9 Price, 304., the question is, not whether it is a penal statute with respect to the strict construction of the words inflicting the penalty, but whether it is a penal action within the meaning of the rule, that, in a penal action, a new trial shall not be granted, of which there are many other cases to the same effect, as *Selson v. Powell*, 6 Taunt, 299., and *Borres v. Booth*, 2 Black, 1226.

household goods, and the necessary wearing apparel of himself, his wife and children, excepted,) which he was assignee as shall not be paid by dividends under his commission, together with shall remain liable for so much lawful interest for the whole of his debts to the estate of debt."

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For these reasons, therefore, because the 20 per cent is not chargeable by any express words, or by implication, either from other words in 6 Geo. 4. c. 16., or by reference to 49 Geo. 3., either by supposing that the omission of the words "per cent." was from accident, or because the use of them was unnecessary, and would have been surplusage, and because it is a penal statute, and to be construed strictly as to the penalty, we submit that the commissioners are right in having charged only one gross sum at 20 per cent.

It has been contended, that when any doubt exists, the statute is to be construed beneficially for creditors, because by section 135 it is so enacted.

The answer to this is obvious. It was not intended to give to the courts an arbitrary power to insert words not used by the legislature, but that in disputes between an individual creditor and the general body of creditors, as in cases of lien, preference, &c., the statute ought in doubtful cases to be interpreted in favour of the body of creditors; but, even supposing this explanation of the section not to be satisfactory, such interpretation is not applicable to the present case, which is asking for a construction, not in favour of the creditors, but in favour of the bankrupt.

But, assuming that 20 per cent. per annum is chargeable, it is not chargeable beyond the commencement of 6 Geo. 4., which repeals the previous statutes, and which is not retrospective in its operation.

The words of the act (sect. 104) are as follows: "That if any assignee *shall* retain in his hands, or *employ* for his own benefit, or knowingly *permit* any co-assignee so to retain or employ any sum to the amount of one hundred pounds or upwards, part of the estate of the bankrupt, or *shall neglect to* invest any money in the purchase of exchequer bills when so directed as aforesaid, every such

assignee shall be liable to be charged in his accounts with such sum as shall be equal to interest at the rate of 20 per cent. on all such money for the time during which he shall have so retained or employed the same, or permitted the same to be so retained or employed as aforesaid, or during which he shall have so neglected to invest the same in the purchase of exchequer bills; and the commissioners are hereby required to charge every such assignee in his accounts accordingly."

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But all the words of this clause are clearly prospective; and not retrospective: thus the expressions are, "*shall* retain in his hands," not, *shall have* retained; "*shall* employ for his own benefit," not *shall have* employed; "*shall* knowingly permit," not, *shall have* permitted; "*shall* neglect to invest," not, *shall have* invested, &c.

But in addition to this material circumstance, that these words are all prospective, we find that this clause enacts a new offence; viz. "*shall* neglect to invest any money in the purchase of exchequer bills when so directed as aforesaid," and for this new offence he is punishable "*for the time during which he shall have* so retained, &c." If these latter words have any meaning, it is evident that the legislature contemplated the commission of the offence, and the continuing it, after the act should have commenced.

There are various other clauses in this act, which, the courts, proceeding upon this principle, have determined not to be retrospective. Thus in *Kay v. Goodwin* (a), it was determined that section 92 was not retrospective. That section is as follows: "That if the bankrupt *shall not* (if he was within the united kingdom at the issuing of the commission) within two calendar months after

(a) 6 Bing. 576.

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the adjudication, or (if he was out of the united kingdom) within twelve calendar months after the adjudication, *have* given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of or previous to the adjudication of the petitioning creditor's debt or debts, and of the trading, and act or acts of bankruptcy, *shall be conclusive* evidence of the matters therein respectively contained, in all actions at law or suits in equity brought by the assignee for any debt or demand for which the bankrupt might have sustained any action or suit."

The same question arose in *ex parte Salmon* (a), under the words of section 132, which were also resolved not to be retrospective. The words of this section are, "That the assignees shall, upon request made to them by the bankrupt, declare to him how they have disposed of his real and personal estate, and pay the surplus, if any, to such bankrupt, his executors, administrators, and assigns; and every such bankrupt, after the creditors who have proved under the commission shall have been paid, shall be entitled to recover the remainder of the debts due to him; but the assignees shall not pay such surplus until all creditors who have proved under the commission shall have received interest upon their debts, to be calculated and paid at the rate and order following; (that is to say,) all creditors, whose debts are now by law entitled to carry interest in the event of a surplus, shall first receive interest on such debts at the rate of interest reserved or payable thereon, to be calculated from the date of the commission; and after such interest shall have been paid, all other creditors who have proved under the

(a) 1 *Mont.* 253.

commission shall receive interest on their debts from the date of the commission, at the rate of four pounds per centum."

But it has been urged by the other side that this section is retrospective, because by section 135 it is enacted, "that nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or affect or lessen any right, claim, demand, or remedy which any person now has thereunder, or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted." But the question in this, as in all similar cases, is, Whether, aye or no, this clause contains within itself a clear specific enactment? If it does, it follows that it is not retrospective. Thus, in *Churchill v. Crease* (a), it was contended that the 82d section, the words of which were retrospective, were prevented from having that operation by the 136th section, which enacted when the act should come into operation; but it was decided to be retrospective; and *Best*, Chief Justice, said, "The rule is, where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, it is to be considered in the nature of an exception."

A similar principle prevailed in *ex parte Grundy* (b), where the Lord Chancellor held, that the general words of section 135 did not controul the particular intent expressed in section 56.

(a) 4 Bing. 179; and see *Terrington v. Hargreaves*, *ibid.* 492, where *Best*, Chief Justice, rectifies a mistake in the report of *Churchill v. Crease*.

(b) *Mont. & Mac.* 293. See particularly pp. 310, 311.

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But, 3dly, supposing that twenty per cent. per annum is chargeable, it is chargeable only by the creditors, and not by the bankrupt, who is not entitled to it, either as allowance or as surplus.

It is not chargeable by the bankrupt *on account of his allowance*.

The allowance is given to the bankrupt as a reward for his not speculating with his creditors' property, when, from his knowledge of his embarrassments, he ought to attend to their interests in preference to his own; and, to induce an early declaration of his insolvency, the amount of the allowance depends upon the amount of dividend *payable out of his estate*, not out of forfeitures, whether occasioned by himself or by others. The words of sect. 129 are, "That every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who have proved under the commission ten shillings in the pound, shall be allowed five per cent. out of such produce, to be paid him by the assignees, provided such allowance shall not exceed four hundred pounds; and every such bankrupt, if such produce shall pay such creditors twelve shillings and sixpence in the pound, shall be allowed and paid as aforesaid seven pounds ten shillings per cent., provided such allowance shall not exceed five hundred pounds; and every such bankrupt, if such produce shall pay such creditors fifteen shillings in the pound or upwards, shall be allowed and paid as aforesaid ten pounds per cent., provided such allowance shall not exceed six hundred pounds; but if such produce shall not pay such creditors ten shillings in the pound, such bankrupt shall only be allowed and paid so much as the assignees and commissioners shall think fit, not exceeding three pounds per cent., and three hundred pounds."

But this has reference only to the estate of the bank-

rupt, and not to the estate of other persons distributable under the commission; as in the case of property in the reputed ownership of the bankrupt, which, although forfeited by the individual proprietor in favour of the general creditors, is not forfeited to the bankrupt; so in the case of fraudulent preferences, where the bankrupt, with intent to prefer a particular creditor to the exclusion of the general creditors, has given a preference, which is invalidated by the assignee. His allowance, given for his attention to the interests of the general creditors, cannot be composed of any part of such property which he so intended to abstract from them.

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So, too, the forfeiture by the petitioning creditor of his debt by section 8, for compounding with the bankrupt, cannot enure for the benefit of the bankrupt.

In the same manner, the forfeiture of 20 per cent. cannot form any part of the allowance, not only because it does not arise out of the early declaration by him of his insolvency, but because it is expressly enacted by section 100, that all sums forfeited under this act shall be divided among the creditors. (a)

Nor is the bankrupt entitled *on account of any surplus.* *surplus.* The words of section 132 are: "The assignees shall, upon request made to them by the bankrupt, declare to him how they have disposed of his real and personal estate, and pay the surplus, if any, to such bankrupt, his executors, administrators, or assigns; and every such bankrupt, after the creditors who have proved under the commission shall have been paid, shall

(a) Sect. 100. "And be it enacted, that all sums of money in any of his Majesty's courts of record; and the money so recovered (the charges of suit being deducted) shall be divided among the creditors."

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be entitled to recover the remainder of the debts due to him."

That this does not extend to this penalty will perhaps appear, by asking, whether, if there were sufficient to pay all the creditors out of the estate of the bankrupt, the bankrupt could insist upon a right to sue for that penalty as part of his real or personal estate?

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ERSKINE, C. J. : — (After stating the facts from the petition.) The principal question arises upon that part of the prayer of the petition which seeks, in taking the account, to charge the assignees with 20 *per cent. per annum* upon the balances retained in their hands.

This must be considered as the petition of the bankrupt; for, although a creditor join in the petition, it is not presented by him in that character. There is no prayer to prove under the commission. They are assignees of the bankrupt under his insolvency. They pray this account as representing the interest of the bankrupt; 1st, As he may be entitled to the surplus; 2dly, In respect of his claim to allowance. For it was argued, that if the charge is established, upon taking the account there will be assets to pay the creditors and leave a *surplus*; or, if the charge should fail to establish a surplus, that there will be enough to pay a dividend of 10s. in the pound, and that in such case the bankrupt will be entitled to an allowance.

The commissioners have allowed one sum of 20*l. per cent.* for the whole period of thirteen years during which the money has been retained. The petitioners contend that the sum should be thirteen times as great.

The question arises upon the 104th section of the 6th Geo. 4., whereby it is enacted, "that if any assignee shall retain in his hands, or employ for his own benefit, &c. any sum to the amount of 100*l.* or upwards, part of

the estate of the bankrupt, &c., every such assignee shall be liable to be charged in his accounts with such sum as shall be equal to interest at the rate of 20 per cent. on all such money for the time during which he shall have so retained or employed the same," &c.

The Court, before it decides the important question, whether the 20 *per cent.* is to be charged annually or only once, ought to ascertain whether the petitioners are interested. If they have no pecuniary interest, they can have no right to the order which they pray.

The first question is, Whether the bankrupt has a right to have this sum charged in the account?

The claim is founded on the 128th and the 132d sections of the act. The 128th section provides, that "every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors 10s. in the pound, shall be allowed 5 per cent. out of such produce," and he is to receive further allowances out of his estate of sums increasing in proportion to the dividend paid.

The 132d section requires the assignees to account to the bankrupt for the administration of the estate, and to pay the surplus, if any, to him or his representatives.

The matter upon both sections is resolved into this question, Whether the 20 *per cent.*, if charged in the account, becomes part of the bankrupt's estate, so as to bring it within the terms, "net produce," or in substance as any part of the bankrupt's real and personal estate? Could the bankrupt claim it as any part of his estate? The petitioners insist, that it is to be taken as the assumed profit made out of the estate, and therefore part of the bankrupt's estate. If I could so construe the 104th section, I might assent to the proposition; but the intention of the legislature was, not to assess the profits made by the assignee, but to fix a sum by way of

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penalty beyond any supposable profit, to deter the assignee from employing the creditor's fund instead of depositing it in the banker's. The interest of the creditors alone is contemplated in this clause of the statute.

The commissioners are to audit the accounts: the commissioners only are authorized to charge the 20 per cent. upon the account so audited, and it is only for the purposes of a dividend among the creditors that it can be so charged.

The bankrupt laws deal with the bankrupt as an insolvent. The principal object of the law is to protect the creditor from the frauds of the bankrupt and the consequences of his insolvency, to mitigate the losses of his creditors, and distribute among them the wreck of his property. This is the scope of the law. There may be cases of temporary pressure, where eventually the funds prove adequate to the demands of the creditors; and, when they have been satisfied, the surplus is restored to the bankrupt. But the law looks to the sufficiency of the estate for the satisfaction of creditors: it cannot be supposed to contemplate a case of a bankrupt becoming a gainer by his own insolvency.

It may be said, that the policy of the law in favour of the bankrupt appears by the provision for allowance in proportion to the dividend, if it exceeds a certain amount; but this is a reward for his diligence, and calculated to promote the interest of the creditors. But, looking to the general principles of the bankrupt law, it is impossible to hold that the charge of 20 per cent. could be intended to create a surplus; and upon this view the claim of the bankrupt is untenable.

To arrive at a satisfactory conclusion, it is desirable to look closely into the structure of the acts relating to the subject.

. The petition claims 20 *per cent.* from the year 1818.

The statute 6 Geo. 4. c. 16. did not come into operation until September 1825. To support the claim for the time preceding that date, unless the statute is supposed to have a retrospective operation, authority must be sought in some earlier statute. It cannot be maintained that the effect of the act is retrospective; but it is argued, that the claim for the interval between 1818 and 1825 may be supported by the 4th section of the 49 Geo. 3. c. 121. It is clear, however, from the spirit and the enactments of that statute, that the charge is intended only for the satisfaction of creditors. The 3d and 5th sections of the 49 Geo. 3. c. 121.; instead of pursuing the language of the 5 Geo. 2. c. 30. s. 33., makes new provisions upon this subject. By the former statute, section 33, after providing that the assignees shall account for their receipts and disbursements, enacts, "That the commissioners, or the major part of them, shall order such part of the net produce of the said bankrupt's estate as by such accounts or otherwise shall appear to be in the hands of the said assignees, as they or the major part of them shall think fit, to be forthwith divided amongst such of the bankrupt's creditors who have duly proved their debts under such commission."

The latter statute, instead of adopting these words, provides, by section 5, "That for the purpose of ascertaining in what manner the money which shall from time to time come to the hands of such assignee or assignees has been employed, the commissioners shall in no case declare a dividend upon admission only of a certain sum in the hands of the assignees, but shall require such assignee or assignees to deliver, upon oath, a true statement in writing of all the sums of money received by such assignee or assignees, and when received by him or them respectively, and on what account, and

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how employed; and shall examine such statement, and compare the receipts with the payments, and ascertain what balances have been from time to time in the hands of such assignee or assignees respectively; and shall enquire for what reason any sum, appearing to be in the hands of such assignee or assignees, ought to be retained, and thereupon shall declare a dividend on the remaining sum."

What is the reason for this change of expression and enactment? Apparently because of the new provision, in the 4th section, for charging the assignees in their accounts with a per centage upon monies used or retained by them, contrary to the directions of the 5 Geo. 2.; by the effect of which new provision, sums so charged upon the assignees might be added to the account, and become divisible among the creditors; and these sums would not have come within the meaning of the words in the former statute, "neat amount of the bankrupt's estate."

I am of opinion that, under the 49 Geo. 3. c. 121., no claim can be sustained. (a) If there is any ground for a claim, it can only date from the 1st of September 1825. It is provided by the 6 Geo. 4. c. 16. s. 104., "That the commissioners shall order such part of the '*net produce*' of the bankrupt's estate in the hands of the assignees as they shall think fit to be divided among the creditors." This is to be done after the accounts shall have been audited; and from the expression "net produce," there being no direction in the 104th section that the 20 *per cent.* should be divided among the creditors,

(a) 6 Geo. 4. c. 16. "Whereas it is expedient to amend the laws relating to bankrupts, and to simplify the language thereof, and to consolidate the same, so amended and simplified, in one act, and to make other provisions respecting bankrupts; be it therefore enacted, that an act passed in the forty-ninth year of the reign of his late Majesty, intituled 'An Act to alter and amend the laws relating to bankrupts,' be hereby repealed."

it seemed as if the charge was to be attached by way of increment to the bankrupt's estate, and as such would be applicable to the surplus as well as the dividend. I therefore doubted for some time, on this view of the case; but it is obvious, from the arrangement of the clauses, that the dividend only is to be regulated by the state of the account, and that upon the question of surplus there is to be a remoulding of the account. (a) There are many items in the account which could not be carried to the surplus, as there is no provision for rendering any account to the bankrupt upon this charge, nor any opportunity or right given to him for making the charge.

These general views of the principle and policy of the bankrupt laws have outweighed the inference arising from the particular words of the 104th section, have removed my doubts, and brought my mind to the conclusion, that no part of the 20 per cent. can be part of the bankrupt's estate. The per centage is not given by the 104th section directly as interest upon the sum; the provision is, that the assignees shall be charged with such sum as shall be equal to interest at the rate of 20 *per cent.* It assumes the character of a penalty.

In argument it has been urged, that the charge is to be considered as liquidated damages; but if so, an injury must be shewn. The surplus, upon that view, must be established at a given date — the time when the money was retained, not by addition of the charge. The fact affords no foundation for this argument; and the bankrupt, therefore, admitting the argument, has no interest.

If it were probable that at the time there was, or that upon the account there would be, a surplus, the bankrupt

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could have no claim; the Court could not enforce the claim on his behalf.

If the petitioners are content to have an order for taking the account, they must, in my opinion, take it without the direction prayed, for charging the 20 per cent., and subject to the question of costs according to the result.

As to the decision of the commissioners on the question, Whether the charge ought to be 20 per cent. once upon the whole sum, or 20 *per cent.* annually? I give no opinion; as I think it in all cases inexpedient, if not mischievous, to go beyond the matter which calls for the judgment of the Court. As to the other parts of the prayer of the petition, it must be dismissed. If the Court had jurisdiction, they might order the assignees to pay out of their pocket the costs of attendance. We cannot make the bankrupt's estate pay for the misconduct of the assignees. The conduct of the assignee is unjustifiable, but we cannot supersede the commission. The conduct of the petitioner was irregular in obtaining the commission of the 4th of March 1831. If the assignees had been guilty of misconduct, the case should have been brought before the Lord Chancellor.

PELL, J.: — This is a question of the utmost importance to the public. It turns upon the construction of the 104th section of the 6 Geo. 4. c. 16. (a) The respondents contend, that 20 per cent. should be charged once upon the gross sum retained; the appellants argue, that the charge should be 20 per cent. per annum. I am of opinion, that where assignees, contrary to law, keep

(a) The words are: "Every such sum as shall be equal to such assignee shall be liable to interest at the rate of twenty be charged in his accounts with per cent."

money in their hands, they are chargeable with 20 per cent. per annum upon the whole sum, and during the period of retention. This opinion is founded upon general reasoning, as well as a legal view of the subject. As a judge, I am bound to consider the state of the law before the passing of the 6 Geo. 4. c. 16. and what was the inconvenience or mischief to be redressed by that statute; I am bound to look, not merely to the words of the act, but the grievance and the remedy.

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What then was the grievance? It had been found that assignees retained in their hands large sums of money, which they used for their own purposes, and had delayed the rendering their accounts, and the calling of meetings to make and declare dividends. To remedy this grievance the creditors were enabled, by the 5 Geo. 2, c. 30., to direct where the property collected under the bankruptcy should be lodged until it should be divided among the creditors; the assignees were required to conform to this direction, and were indemnified upon such conformity. But there was no express provision to enforce the observance of this direction. So the law continued until the passing of the 49 Geo. 3. c. 121., when it was enacted, "That, in default of direction by the creditors, the commissioners may and they are required to direct where the monies received by the assignees shall be deposited;" and it is provided, "That if the assignees wilfully retain in their hands, or employ for their benefit, any monies, part of the estate of the bankrupt, contrary to the direction of the creditors or commissioners, they shall be charged in their accounts with the estate of the bankrupt with such sum as shall be equal to the amount of interest, computed at the rate of twenty per cent. per annum on the sums, and for the time during which they shall have so retained or employed them;" and the commissioners are required ac-

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cordingly to charge the assignees with such sums in their accounts.

The enactments upon this subject in the 5 Geo. 4. c. 98. differ in words, but are the same in substance as those of the preceding statute. Up to the date, therefore, of the statute 6 Geo. 4. c. 16., the law had made assignees offending in this respect chargeable with 20 *per cent. per annum* upon sums improperly retained or employed by them.

The 6 Geo. 4. c. 16. does not follow the words of the former statutes. There is an omission; and the words omitted are, "*per annum.*" But, notwithstanding the omission of those words, the substance of the enactment is the same. For if not, I ask, what happened in the interval between the 49 Geo. 3. and the 6 Geo. 4. which should create a necessity to alter the law as to the extent of the protection to be afforded to creditors against these abuses of trust by assignees?

Under the provisions of the 49 Geo. 3. c. 121. the words have been considered so imperative, that assignees retaining money in their hands for an hour, even for meritorious purposes, have been held liable to the charge of 20 *per cent. per annum*; as in *ex parte Bray* (a), a case where the money would have been lost if it had been paid into the banking-house, according to the direction of the commissioners. And I may be allowed to observe, with great respect for the profound learning of the Judge by whom the case was decided, the words of the statute being "wilfully detain," that it was to my mind an extraordinary judgment. After that decision a slight alteration upon this subject took place in the 5 Geo. 4., but the variance does not touch the substance of the clause. The matter returns to this ques-

(a) 1 *Rose*, 144.

tion, whether the 20 *per cent.* in the 6 Geo. 4. c. 16. is the same in construction as the 20 *per cent. per annum* in the 49 Geo. 3. c. 121.

I am much struck with the constant endeavour, which was apparent in the argument of this case, to introduce the word and notion of penalty. The judgment of the Vice-Chancellor seems to have proceeded on the ground that the charge was to be considered as a penalty on the assignees. The case ought to be decided upon a fair construction of the act, without this terror of the word “penalty.”

As to the *dicta* and decisions which have been cited for the constructions of acts of parliament, some have not been mentioned, where it is laid down, that you are not to look to the letters or words of an act but to the grievance and the remedy. In the case of *Mitchell v. Torup, Parker, Rep. 233*, it is said, in expounding acts of parliament, where words are express, plain, and clear, the words ought to be understood according to their genuine and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the act by reason of some subsequent clause, from whence it might be inferred the intent of the parliament was otherwise; and this holds with respect to penal as well as other acts. And again, from *Moore v. Hussey, Hob. 93*, the same doctrine is to be collected. So that the argument which has been pressed upon us, as to the construction of penal statutes, vanishes, if these authorities are to be regarded. Again, Mr. Justice Buller, in the case of the King v. *Hadnett*, 1 *T. R.* 101, says, “It is not true that the Court, in the construction of penal statutes, are to narrow the construction. We are to look to the words in the first instance, and where they are plain we are to decide on them; if they are

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doubtful, we are then to have recourse to the subject matter; but, at all events, it is only a secondary rule."

In the case of the Attorney General v. *Sudell*, Prec. in Chan. 214, upon a question, Whether the Court should restrain a defendant from setting up a mortgage to defeat a proceeding at law upon an assignment of the king's title to a presentation upon a vacancy arising upon a simoniacal presentment by the mortgagor, it having been urged in argument that the law was penal, and not to be aided in a court of equity? the Lord Keeper said, "I consider what will be the consequence both ways; and if this practice be not avoided, it will in a great measure avoid the laws against simony: for this will lead to the case of trustees; and it being a constant rule here that *cestui que trust* shall have the benefit of the thing, if he be to have it, to all intents but to forfeit, then the corrupt patron shall present by his trustee, which is contrary to the plain intention of the act; and though this be called a penal law, yet this Court will aid remedial laws, not by making them more penal, but to let them have their course; and the law knows nothing of a trust, and therefore this Court will take care that its own notions shall not be made use of to elude so good and beneficial a law. And thereupon it was decreed, that the title should not be set up."

After these authorities, it can hardly be assumed that this is a case of penalty, and that a special construction is to be put upon the act, because it is a case of penalty. The doctrine is so unfounded, that a case upon the construction of a statute has occurred where life was in question, and yet the letter of the law was disregarded, and the substance effectuated by construction. The case is cited in *Plowden* (a), as having occurred in the

(a) Page 86.

19 Hen. 6. A man was arraigned upon an indictment for killing the wife of his master, upon the statute 25 Edw. 3., by which it is declared, that if a servant kills his master it is treason; and the question was, whether he should be hanged as a felon, or drawn and hanged as a traitor; and it was adjudged, “by the advice of all the justices, that he should be drawn and hanged, because it was treason;” and it was said, “that it was not taken within the equity of the statute, which speaks only of killing his master, but is rather within the words of the statute, for master and mistress are the same thing in effect.”

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These are authorities so strong upon the construction of penal statutes, that it may well be said, upon the construction of the statute in question, that “*per centum*” is the same as “*per centum per annum*.”

Lord Coke, in the First Instit. 381, says, “Acts of parliament should be construed *ex visceribus*, so as to work no wrong, and so as to suppress the mischief and advance the remedy.” So, in *Shepherd v. Gosnold* (a), it is said, “Where the penning of a statute is dubious, long usage is a just medium to expound it by; for *jus et norma loquendi* is governed by usage, and the meaning of things written or spoken must be as it hath constantly been received by common acceptance.”

In common language, *per centum* means *per centum per annum*, and in different clauses of the act the words *per centum* are used as *per centum per annum*. In other clauses of the act “*five per cent.*” is used, and to be understood as *five per cent. per annum*. If the clause in question stopped at the words “*twenty per cent.*,” the construction for which the respondents contend might be sustainable; but these material words are added: “on all such money

(a) *Vaugh.* 169.

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for the time during which he shall have so retained or employed the same.” These words have no meaning if the assignee is to be charged once upon the whole sum, and not during the whole period of retention. What is the result of the proposed construction? The counsel for the respondents is driven to admit that if he retains the money a day he is chargeable with 20 *per cent.*, and if he keeps it twenty years, no more is chargeable. So that if it is rightly denominated a penalty, it is the same, whether the offence is of one hour or twenty years in duration.

This is in the teeth of the first principles of criminal law, which seek to proportion the punishment to the offence; and the conclusion must be, that the party who embezzles the property for twenty years is no more criminal than the delinquent of an hour. Upon principle, and a view of the inconvenience proposed to be remedied by the act, I construe the words to mean 20 *per cent. per annum.*

Before the provision made upon this subject in the 49 Geo. 3. c. 121., where an assignee had kept or used the assets improperly, the Lord Chancellor in some cases charged him with 4 *per cent.*, and in other cases with 5 *per cent.* That compensation or penalty proved insufficient to repress the abuse. The 49 Geo. 3. c. 121. then in express terms imposed the charge of 20 *per cent. per annum.* I give the same construction by inference and the context to the words in the 6 Geo. 4. c. 16. Upon any other construction what is the consequence? Here is money kept by an assignee from 1817 to 1831; he is charged by the commissioners 20 *per cent.* once upon the whole sum. The amount of this charge, distributed among the series of years, is 2½ *per cent.* How then does the case stand? Before the 6 Geo. 4. c. 16. the Lord Chancellor would

have charged this assignee with a larger sum. Yet, according to this construction of the 6 Geo. 4. c. 16., he is charged with a less sum than if that act and the 49 Geo. 3. c. 121. had never passed. The former act, therefore, upon this view, gives a *bonus* to the assignee upon keeping the money, for he escapes with a charge of $2\frac{1}{2}$ *per cent.* per annum. The act so construed is calculated to promote a grievance which the legislature intended to redress.

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It is argued, however, that the bankrupt has no interest. But I conceive that all the statutes in bankruptcy have been made for the protection, security, and benefit of the fair trader, as well as the fair creditor. The construction which gives a benefit to the creditor ought not to operate to the exclusion of the bankrupt. I do not agree in the language in some of the legal comments on this subject. The statutes propose to clear the bankrupt from his difficulties and legal liabilities, and to divide his property among the creditors. The bankrupt is as much entitled to the benefit of the law as it regards him, as any of the creditors as it regards them. But before I close my observations upon the construction of the act, I may refer to an authority on the point which is conclusive. In *ex parte Wackerbeth* (a), Lord Eldon says, “I believe there is no other statute which requires attention upon the subject, except the last statute (6 Geo. 4. c. 16.), which adopts in substance the words of the former statutes, as to directing where the money arising from the bankrupt’s estate shall be deposited.” He must have had those statutes before him, or present to his memory, at the time of making this observation. He then adds, “there is a power given to the commissioners to direct that the money should be invested in

(a) 2 G. & J. 159.

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exchequer bills; which existed likewise in the former statute, but in a more restricted form. Then follows the section enabling the commissioners to charge the assignee in account with 20 *per cent.*, as in the former statute." Now Lord *Eldon* could not have been unaware of the omission of the words "*per annum*" in the then last statute.

But it is argued, that, admitting this construction, the bankrupt is not entitled. That is a singular proposition. Suppose no statute upon the subject had ever existed, and the assignee, upon retaining the assets, had been charged 4 *per cent.* upon petition to the Lord Chancellor, and by this charge a surplus had been created; would not the bankrupt have been entitled to the surplus so constituted? It is the money of the bankrupt which retained and used, and he therefore is entitled to the surplus.

It is supposed that after the assignment it is no longer the bankrupt's estate; but that is not so. It remains his estate, subject to the claims and rights of the creditors. This is the view and language of the statutes, and this qualified right to the estate remains until all the affairs are wound up. In *ex parte Archer* (a) it was contended that the bankrupt had no right to such claim; but the Vice-Chancellor held, it being the case of a surplus, that the proposition was not borne out.

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 were all petitions by bankrupts complaining of misconduct on the part of assignees. In *ex parte Archer* the Vice-Chancellor says, "It is true that to support an application of this sort the bankrupt must shew that he has at least an apparent interest;" and he added, that "in the case before him he had not only an apparent,

(a) 2 G. & J. 110.

but a certain interest." He then went into the figures, to shew that there would be a surplus. So will I, to shew that if the construction is right to charge 20 *per cent. per annum*, there will be a surplus to which the bankrupt will be entitled. Upon the question of his right and interest, I observe, that the commissioners have given him a benefit, by directing the account to be taken against the assignees with the simple charge of 20 *per cent* on the gross sum. It is said by the Vice-Chancellor, in the report of the judgment, that as the amount of dividend is less than 10s. he cannot upon any computation be entitled either to allowance or surplus. This is founded upon the limited construction of the statute; but upon the other construction he has an interest. The charge, whether it be called liquidated damages, or any thing else, is a reparation or compensation for the injury done by the assignees in retaining the money as a fund, productive to them, but unproductive to the creditors and the bankrupt.

It must be considered, therefore, as the property of the bankrupt. As to the argument in the case of penalty of 500*l.* it could not be considered his property, it is sufficient to say, that this is not a penalty, and it is not now necessary to decide such a question. This is a compensation for the use of money. If it is to be considered a penalty the argument may be answered by saying, that by the allowing 20 *per cent.* on the gross sum the creditors might receive 20s. in the pound, and a surplus might be left.

According to the argument, the bankrupt would not then be entitled; but, if so, who is to have the surplus? If it is a penalty, it cannot go back to the assignees: the crown certainly would not claim it; it can therefore belong only to the bankrupt, having been made by the use of his money, he only is entitled to the benefit. It is

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said that the clause is not retrospective ; but section 4, 49 Geo. 3. c. 121., giving 20 per cent. per annum, is adopted in substance by the following statute, made to bear upon this case in the fullest manner.

In the 135th section of the 6 Geo. 4. c. 16. it is provided, that the practice in bankruptcy shall not be altered by the statute, except where the alteration is expressly declared, that is, by specific enactment. Can this be so called? In *ex parte Grundy* a retrospective effect was given to the act, and a case brought under it, by implication, much stronger than this. In *Kay v. Goodwin* (a) the C. J. says, “ It has been said that there are several cases in which the construction of this act of parliament has been, that it should apply to commissions which had been issued and were then in the course of operation. That may be the case when the law has been altered in general terms, or old provisions are re-enacted.” The question was, whether the old provision was re-enacted. He goes on to say, “ but when new provisions are introduced which apply to particular cases, and give entirely new remedies, we must look to the very words of the sections, to see whether they apply or not to by-gone and then existing commissions.”

After these decisions and *dicta*, it cannot be contended that the 104th section is a new enactment. It is in substance a mere re-enactment. I am of opinion that the charge ought to be 20 per cent. per annum, and that the bankrupt has an interest in the charge.

Upon the other parts of the case, I may observe, that where there is an appearance of contrivance and evasion I would lend a willing ear to further inquiry. If the petitioner takes the inquiry, it may be at the risk of costs on failure. Giving security for costs, he is entitled to the relief.

(a) 6 Bing. 584.

The conduct of the petitioner is not free from blame. The commission issued in 1816, the insolvency in 1821, and nothing is done till 1831. How did it happen that he did not come sooner? Stale demands are not to be encouraged. It is clear, however, that the assignees have been guilty of misconduct; for it has been found by the commissioners that they have improperly retained the money from 1816 to 1831, and they are therefore charged in the account.

The renewed commission of 1831 cannot be treated as waste paper, for the assignees have adopted and acted upon it. The conduct of the assignees, one of them making suspicious excuses, and the other saying, "that he had enough to do without meddling in Aaron's affairs," is reprehensible. The name of Mr. *Donkin* is left out in the second renewed commission upon a mere pretext.

CROSS. J.—The petitioners in this case are the representatives of the bankrupt, as his assignees appointed by the court for relief of insolvent debtors. Great pains were taken in argument to support this as the petition of creditors; but the petitioners can only be considered as assignees of the bankrupt. It is on behalf of the bankrupt that the petition prays that the assignees may be charged in their accounts with 20 *per cent. per annum*. This is the principal matter in dispute. The object is, by means of the charge, to work out an allowance or surplus for the bankrupt. The petition rests on the following grounds:—1st. That the assignees are liable; 2d, That a surplus will be established by the account; 3dly. That the assignees are bound to pay over to the petitioners the surplus when ascertained. If in all these grounds the petitioners fail, it must be admitted that they have no interest. To establish the

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liability of the assignees, the petitioners, for their claim as far as the 1st of May 1825, must rely upon the 49 Geo. 3. c. 121. s. 4., notwithstanding its repeal by the 5 Geo. 4. c. 98.

From the 1st of May to the 1st of September 1825 they must rely upon the 5 Geo. 4. c. 98., notwithstanding its repeal by the 6 Geo. 4. c. 16.; and for the rest of the period up to this time they contend that the assignees are chargeable, notwithstanding the failure of the bank, and the omission to make a new appointment. I will assume in argument that the assignees are so chargeable, and that there would be a surplus on the account, and proceed at once to the question, whether the assignees would be bound, after the creditors are satisfied, and the expenses of the commission defrayed, to pay over the surplus to the bankrupt? It is not necessary to decide that the bankrupt could not in any possible case call for such payment, or whether he is in *pari jure* with the creditors, and equally interested.

I propose to confine the question to cases where there is no original surplus independently of the default of and charge upon the assignees; where the bankrupt has obtained his certificate, and where, as I apprehend, he has suffered no injury.

It is contended, that whether he has suffered injury or not, the bankrupt is entitled to the property: that the court is bound to assist him in obtaining it, by directing that the assignees should be charged, and that the surplus, if any, must devolve on the bankrupt. I agree that the statute is remedial, and not penal. But remedial laws are made only for parties who are injured: they only need the remedy. It is contrary to reason to say that remedies are provided by law for parties who have suffered no wrong. But in this case the creditors only are aggrieved. It is their money which the assign-

nees have retained. The charge, if any, must be made for their benefit. It is not the money of the bankrupt, and he therefore is not wronged, where no surplus arises out of his original fund. The question as to the allowance stands on the same footing. The dividend, by the addition of the 20 *per cent. per annum*, would not arise out of the bankrupt's original fund, but by the charge arising out of the use of the creditors money. In either case the bankrupt has no legal interest in the claim, whether it be for 20 *per cent. per annum*, or once upon the gross sum. On this question, as to how the account should be taken, I give no opinion : but upon the defect of title in the petitioners, I agree with the Chief Judge and the Vice-Chancellor. If this should be the ultimate judgment, all the other points will be resolved into questions of costs. On this matter I propose to give no opinion until the course taken by the parties is ascertained.

ROSE, J. :—

These very voluminous petitions, after all the time that they have occupied, both of the bench and of the bar, resolve themselves into two very short points : the supersedeas of the renewed commission of June 1881, and the taking of the accounts. As a circumstance in this latter branch of the relief, it became highly material to consider, how far the order to take such accounts, if the court were disposed to make such order, should, or should not, contain a declaration, that the respondents were, upon balances retained, to be charged with 20 per cent. I say 20 per cent., and not 20 per cent. *per annum* ; for, as I am of opinion, that the petitioners are not entitled to *any* declaration whatever on this subject, it is unnecessary to express either my dissent from or concurrence with the judgment of His Honor the Vice-Chancellor on

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this part of the case. During the argument, the attention of the bar was very usefully drawn to these, the issues between the parties; and as I at a very early period of the discussion, had the opportunity of expressing the opinion which I had long formed upon both these points, and which nothing that I have heard has operated to remove, I can have but few observations now with which to detain the court.

I apprehend it to be quite clear, that unless the renewed commission of March 1831 be a regular and valid commission, it is impossible for the petitioners to found upon that commission, any title to supersede the renewed commission of June 1831. Was therefore the commission of March 1831 regular and valid? It issued upon the application of *Cutill & Lowe, as the assignees of Aaron under the insolvent debtors' act*, and was therefore in effect a renewed commission issued on the petition of the bankrupt. Can this be done? I do not mean to say that it may not have been done. In the loose manner in which renewed commissions have passed in the bankrupt office, it may have been done without observation or challenge; but being now in this instance open to observation, and challenged, can it be done, either upon principle or authority? Now first, as to principle: nothing is more contrary to the principle of the bankrupt law, than that a bankrupt should interfere with this process against himself. Concerted commission in equity, and concerted act of bankruptcy, both at law and in equity, are bad upon this principle; and the act of parliament, from which alone the Lord Chancellor derives the power to award a commission, expressly says, he must do it upon the petition of a creditor. (a) This direction is express as to an original commission; and

(a) See the Section.

where is the principle, or the authority, which says, that a renewed commission is to be awarded upon a less sanction. The powers given to the commissioners over the property and person of the bankrupt, and as to the creditors, are precisely the same, both in a renewed and in an original commission; and looking at it as a question of title, what purchaser would be satisfied with a conveyance from assignees appointed under a renewed commission issuing upon other application than that of a competent creditor? But fortunately this part of the argument is not left merely in speculation; the authorities which have been cited as sustaining the proposition that a commission may issue at the instance of the bankrupt, when explained, really amount to nothing. In *ex parte Waring*, (a) the Vice-Chancellor did not decide that a bankrupt might take out a renewed commission. The dictum of that learned judge in that case is perfectly compatible with the practice, as I shall in the sequel notice. In *ex parte Galpin* (b), which was the petition of the bankrupt for a renewed commission, that he might surrender, for the purpose of a supersedeas, the Vice Chancellor expressly disclaimed the propriety of ordering the renewal at the instance of the bankrupt, and in terms ordered it on the petition of the assignees. If ever a renewed commission ought to have issued on the petition of the bankrupt, *ex parte Galpin* was that case; for all the creditors had been paid the full amount of their debts: they had consented to a supersedeas; and no purpose was to be answered under the renewed commission, except to take the formal surrender of the bankrupt previous to the supersedeas, which then became a matter of course. It does not, however, rest merely here. The point has been actually decided by Lord *Eldon*, whose very doubts are worth

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(a) *Montagu & Macarthur*, 216.

(b) *Ibid.*

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more than the deliberate certainties of most men. The case was this: a commission in 1794 issued against *John Dumbell*. *Jonathan Dumbell* proved a debt under it of considerable amount. The commission had been some time dormant. In 1825 it became advisable to assert some question of property under it; and for that purpose a renewed commission being necessary, *Jonathan Dumbell* applied for and obtained it as of course. It was worked; assignees were chosen in the room of those who were dead, and the bankruptcy was restored to fresh vigour and full operation. At this point of time, *John Dumbell*, the bankrupt, applied to supersede the renewed commission. The ground was, that although *Jonathan* was a creditor on the proceedings, yet that, if an account were taken, he would be found to be a debtor to him, *John*. Upon this petition being heard, Lord *Eldon* expressed a clear opinion, that he had no authority to direct a renewed commission to issue, except upon the petition of a creditor; and he referred it to the Master to take the accounts between *Jonathan* and *John*. The accounts were taken: the Master reported there was no debt: it came on again upon the report, and for further direction, before Lord *Lyndhurst*, C., in 1827; and that noble and learned Judge superseded the commission. (a) As far, therefore, as the petitioners seek to supersede the commission of June 1831, upon the preferable title of the former commission of March 1831, they have no position in court; they must fail: and as it is brought here as in the nature of an appeal, it is impossible not to say but that it must fail with costs. I cannot, however, leave this part of the case, without noticing an observation that has been made as to the hardship upon

(a) See the orders in the secretary of bankrupts' books in the years 1825 and 1827.

a bankrupt, who may be largely interested in his assets or in his bankruptcy, and, if this be the rule, is excluded from having a renewed commission to prosecute his claim. But this is not so; and fortunately the course which the law prescribes is, in this instance, also the more convenient. He has only to call upon his assignees to take out a renewed commission; if they refuse, he presents a short petition to compel them: they must either do so, or shew that the bankrupt has no interest to put them to that expense. This evidently was in the mind of the Vice-Chancellor when he made the observation imputed to him in *ex parte Waring*. If this course had been taken in the present instance, instead of the tremendous bulk of petitions and affidavits now before us, the points raised upon them might have been disposed of, as indeed they ought to have been, in certainly less than 20 *per cent.* upon the time which they have already employed.

The other point is the right of the bankrupt to charge the assignees of his estate with 20 per cent. in respect of balances alleged to have been retained or employed by them in contravention of the statute. Now as to this, I apprehend that the right must depend, either upon the express provisions of the statute, or must arise out of the relation of trustee and *cestui que* trust, as recognized in a court of equity. Now, first, as to the statute: and however great may be the curtesy of modern sympathy towards the bankrupt, the language of the statute treats him, all the way through, as either insolvent or fraudulent; in many instances as both. As to a surplus, — barely glancing in but a few words, and but at the possibility of a surplus — “a surplus, *if any*” — the statute — *quod* statute, — has not condescended to arm the commissioners with any means of ascertaining such surplus for the bankrupt, or of compelling the payment of

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it, *if any*, to him. To accomplish this, he must resort to another tribunal; which tribunal, however it may make use of the commissioners as convenient machinery in working out the remedy, does not employ them from the necessary constitution of bankruptcy, but only as it would employ, if in Chancery, one of the Masters of that Court, or if in this Court, any of the commissioners or of the Judges. The only benefits of the bankrupt, as contemplated for him by the *statute*, are his allowance and his certificate. The first clearly recognizes his insolvency; the second looks at him as insolvent, and as probably also fraudulent, — nay, felonious. Are the assignees *his trustees* by the *statute*? Clearly not. The choice is expressly confined to creditors of a certain class and a prescribed amount; and it has been decided, that if the bankrupt ventures to interfere in it, the nomination will be set aside. Under the *statute*, therefore, the assignees are the accredited representatives and trustees of the *creditors*: it is the money of the creditor which the *statute* considers them as holding: it is the account between them and the creditors, for the purpose of a dividend, which the commissioners are required to audit, and for which the assignees are to state their accounts, and for which purpose, and on which occasion, the commissioners are required to charge them, should the occasion call for it, with the 20 per cent. No interest of the bankrupt is recognized, and in practice all interference of the bankrupt is excluded. But when all the creditors are paid, principal and interest, then what says the *statute*? Nothing more than this: “The assignees shall declare to the bankrupt what is the surplus of his estate, *if any*,” and shall pay the same to him. But what if they refuse? Where is the remedy? Can the commissioners work it out, and compel them to do so, or make any order of payment, as they can do be;

tween the assignees and the creditors? Certainly not. When the bankrupt's surplus arises the jurisdiction of the commissioners over that fund ceases; for it ceases with that which in truth ought to have prevented its existence, with solvency. But then, at this point of solvency and of surplus, the relation of trustee and *cestui que* trust by the effect of resulting trust arises. Equity then interposes, and makes the assignees liable to account to the bankrupt, not by the force and enactments of the statute, but by the operation of its general doctrine. When, however, the bankrupt comes to take the account upon this principle of equity, that the assignees are, by reason of a surplus, to be treated as his trustees, need it be asked here how that liability is to be dealt with? Why, precisely in the same manner as if he were a suitor in the Court of Chancery against the ordinary responsibility of a trustee. The assignees must account for the estate and effects of the bankrupt received, or, if such a case be made out, which, without wilful default he might have received; if he has employed the property to a profit, he must be charged with that profit, or with interest, at the option of his *cestuique* trusts. It is needless to go through the details of a decree with which the gentlemen on both sides are so thoroughly familiar; but it will not escape them, that, in coming to a court of equity, for the purposes stated, the plaintiff must expressly disclaim all penalties. It is obvious, however, that this mode of proceeding, though in form a petition in bankruptcy, is in effect a suit in equity. In the case of a partnership it more emphatically is so; for how can the surplus of a trader, who was in partnership at his bankruptcy, be determined, without having before the Court his partners, or their representatives? and without their consent what jurisdiction as to them is there in the bankruptcy? And this remark

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will serve also to try the claim of the bankrupt to the 20 per cent.; for if it be *his* property, it must, before he can touch one sixpence of it, go over to satisfy the joint creditors, or the interest of the solvent partner; and thus the assignees are to be made trustees, not only for the bankrupt, but for persons, as to whom, by the effect of the bankruptcy — *quâ* bankruptcy — they are completely strangers; for the joint creditors have no claim by the statute, but only by the effect of an equitable order.

In giving this account to a bankrupt against his assignees I think the Court ought not to be very strict in requiring a strong probability of a surplus. I would rather put it thus: the improbability of a surplus ought to operate no further than that the assignees, before they are committed to such an account, should be secured as to their costs. In this case the improbability of a surplus, without the aid of the 20 per cent., is so great, that if the petitioners are inclined to take the account, they must give the assignees that security; and in that way of putting it I have no objection to the order of reference being made. But when I look at all the circumstances of this case; the improbability of the surplus; the nature of this claim; the distance of time at which it is raised; the absence of the partner or his representatives, who strictly ought to be parties to such a proceeding; the silence of the bankrupt as to his supposed interest during so many years; its non-appearance in the particulars of his property upon taking the benefit of the insolvent act; the motives of conduct, which appear to have led to this litigation; — without saying how far I approve of what has been done in this bankruptcy, I should on the whole have been better pleased to have acted altogether up to the Vice-Chancellor's order, and to have dismissed these petitions with costs.

2 Del. Mag. 935. *18 Bea 133.*
1 Del. Mag. 452.
Ex parte TURPIN.—In the matter of BROWN.

3 Har. 552-672.
C. R. *10 Feb. 452.*
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THIS was a petition presented by the assignees of a bankrupt, stating, that the bankrupt had given a bond, conditioned for the payment of 3,000*l.* Indentures of marriage settlement had at the same time been executed, to which the husband, the obligees in the bond, and others, were parties. The sum secured by the bond was vested in trustees, and settled upon the husband for life, with remainder for the benefit of the wife and children. The husband had been declared bankrupt. The trustees had proved for a debt of 3,000*l.*; and a dividend of 8*s.* 9*d.* in the pound, amounting to 1,225*l.*, had been declared. The petition prayed that the dividends might be invested in government securities, and that the interest upon the dividends, when so invested, might be paid to the assignees during the life of the husband.

A trader, upon his marriage, having given to trustees a bond for 3,000*l.* to be settled upon himself for life, remainder to his wife and children, the trustees, upon his bankruptcy, are entitled to prove for the whole sum secured, and to retain the dividends during the life of the bankrupt, until the whole sum is made up. The authority of *Stratton v. Hale*, 2 B. C. C., overruled.

Mr. Swanston for the assignees:—The assignees have the same right against the trustees as the bankrupt had, *ex parte Mitford*, 1 Bro. C. C. 398; and they are entitled to the bankrupt's life interest in the dividends, on the proof by the trustees, *Stratton v. Hale*, 2 Bro. C. C. 489; *ex parte Verner*, 1 Ball & B. 260.

1 M. & Ali 386.
3 Decca 466.
11 ——— 652.
1 Decca 153.
3 M. & Ali 167.

ROSE, J.:—The assignees merely represent the interest of the bankrupt, subject to all the equitable interests, in the fund; and it is quite of course that the fund must be re-established before the assignees can take the interest on the dividends.

355.
1 M. & Ali 445.
1 Decca 341.
2 M. & Ali 354.
2 ——— 230.
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8 Trin 106

Mr. Swanston:—The dividends are not to accumulate until the whole principal sum is raised; for whatever equity there may exist between the bankrupt

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and the trustees, it cannot affect the creditor's right to his life interest in the dividends, which represent the principal sum. There is not any trust in bankruptcy: it is a mere debt proved by the trustees against the bankrupt. What does the proof represent but all the interests under the settlement? — that of the bankrupt during his life; and then the proof operates on behalf of the wife and children, on account of their interest.

The proof represents three distinct interests. Suppose 200*l.* the present value of the annuity upon the life interest of the bankrupt; are not the creditors entitled to it? If there is any doubt, it must have reference to the principle that the husband cannot have his interest until he has fulfilled his obligation. This principle, administered in *Mitford v. Mitford* (a), was upon peculiar grounds. What was there sequestrated was no part of the interest of the husband. All the text books and all the authorities support this claim. *Ex parte Smith* (b); *ex parte Groom* (c); *ex parte Verner* (d); *ex parte Mitford* (e); *Stratton v. Hale*. (f)

ROSE, J.: — Have you found any case, where a trustee, having a right to the proof, the *assignees have come to the Court to get equitable relief*.

Suppose the trustees had brought an action, could they have been restrained? — and upon what terms are you in any other situation than if a bill had been filed.

Mr. Swanston: — The assignees might have objected to the proof in this form; they might have insisted that the proof should be limited, and that a value should be set on the husband's interest.

(a) 9 *Ves.* 86.

(b) 1 *Cooke*, 223.

(c) 1 *Atk.* 114.

(d) 1 *Ba. & Be.*

(e) 1 *Bro. C. C.*

(f) 2 *Bro. C. C.*

ROSE, J.: — Then you should have applied to expunge the proof.

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Mr. Swanston: — The Court will now deal with the proof as if it had been properly made. We are asking no more of the Court than the relief given in the authorities cited. This is a question between two classes of equitable creditors. It is a question which equity is to prevail that of the general creditors or of the trustees.

ROSE, J.: — This is merely a bill in equity to get something for the assignees. The wife might file a bill. They must be admitted creditors, upon the equitable principle of paying the whole debt to the wife and children, on the trusts of the settlement.

Mr. Twiss and Mr. G. Richards, for the wife and children: —

The assignees can only claim what the bankrupt could claim. If the trustees had been holders of something belonging to the bankrupt, it is admitted to be clear: and that coming for equity, you must do equity: so it was in the case before Lord Hardwicke. (a)

ROSE, J.: — Where it was a question of proof, not an application for equitable relief.

(a) *Ex parte Groom*, 1 Atk. 114. The passage containing the expression is as follows: "If a husband becomes a bankrupt after a breach of payment to trustees, they have always been admitted creditors upon 'equitable terms,' and the Court has taken care that the interest of the money shall be paid to the creditors under the commission during the life of the husband, and 'the principal' secured to the wife in case she survives her husband."

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Cross, J.: — The expression as to the “principal” is equivocal; it may mean the whole principal, or that part which is paid in dividends.

Rose, J.: — If it mean only part, what means the equitable condition?

Mr. Twiss: — *Priddy v. Rose (a)* is a case in point. There it was decided that the trustees might stop the dividends, where the principal secured by the husband is not paid.

If dividends can be stopped against the bankrupt, they may also against the assignees.

We appear for the wife and children, and ask nothing. We appear to resist the demands of the assignees.

The bankrupt executed a bond, and is a debtor to the trustees. If the trustees had received and invested the dividends, could the Court take out of their hands any part of the dividends until the capital is made up?

That is a question which depends upon the equitable jurisdiction of the Court. The case is clear, if bankruptcy had not intervened.

Until the whole contract is performed, the assignees are not entitled to the life interest of the bankrupt.

This in effect is a bill in equity; but we do not object to jurisdiction, because the case is clear.

The cases cited are not cases where assignees have applied to the court. They are cases where application was made to be allowed proof under the commission. We ask no favour. We have the legal right.

The question is, Whether the Court will take it away?

As to *ex parte Smith (b)*, it was an application by parties to whom proof was refused.

(a) 3 Meri. 86.

(b) *Ante*, p. 444.

Ex parte Groom (a) was the case of an application, not by the assignees, but by parties seeking to prove under a commission.

The expression "equitable," used by Lord *Hardwicke*, must apply to our proposition.

In *ex parte Verner* (b) the order was made, not for the assignees, but for others.

As to *Stratton v. Hale* (c), there is no entry in the registrar's book.

Equity can only mean what we contend. The case of *Priddy v. Rose* is conclusive, and explains *ex parte Mitford*. *Grant*, M. R., in the former case, says, "In bankruptcy it could be done," and cites *ex parte Mitford* to shew that it was done.

CROSS, J.: — Is there not some conflict between two sets of creditors, both claiming equities.

You contend against the equality of distribution.

ROSE, J.: — The claim is under the bankrupt. The fund can only be reached by the *medium* of a court of equity, and in right of the *bankrupt*.

Mr. *Bigge* for the trustees.

Mr. *Swanston* in reply: — As to *Priddy v. Rose*, bankruptcy makes all the difference. In bankruptcy proof is payment. It is otherwise where there is no bankruptcy. Proof under a commission represents the whole interest. No equity can be founded on a deficiency of dividends, for that is an accident. That would be throwing the whole burden on the general creditors, for the benefit of the particular creditors. That is not consistent with equality of distribution.

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(a) *Ante*, p. 444.

(b) *Ante*, p. 444.

(c) *Ante*, p. 444.

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If the bankrupt lives long enough to make up the whole sum, the wife and children will have suffered nothing by the bankruptcy. As to the expression of "equitable terms," used by Lord *Hardwicke*, he alludes to the peculiar circumstances of that case.

It is argued, that we are asking the aid of equity. In *Stratton v. Hale* it was an application to equity.

ROSE, J.: — If the report of the case of *Stratton v. Hale* proves to be accurate, it is difficult to reconcile the judgment with the case.

The principle has been pressed on the Court, of equality of distribution. There is no difficulty as to that. The trustees have got no advantage; they have proved their debt like other creditors, and are in possession of the money as if by action or voluntary payment.

How can it be got back? Not at law: not by petition in bankruptcy. It could only be by petition to expunge the debt. Then how is the right to be affected by the assignees? Only by the medium of a court of equity, whether by petition or bill.

The assignees come here to have the dividends invested for the interest of the bankrupt; but neither he nor any body representing him can claim any thing as long as there is a default in the amount of the trust fund.

The trustees may say, You must first do equity. We are trustees for your wife and children as well as for you, and you must first fulfil your obligation.

This equity is not accomplished until the whole money is paid.

The cases upon proof are quite distinct.

The assignees ask too much on this petition. They have a right to ask to have the dividends invested and laid up until the sum is accumulated. Costs should be given out of each estate.

ERSKINE, C. J. :— The Court will put off the decision, as the counsel for the petitioners desire to produce authorities. My opinion is not shaken by the authorities cited; but further examination of the case of *Stratton v. Hale* may affect my judgment. I look at the case as one of equity, where the assignees come to ask the Court to do that which cannot be done at law. If there is a difference of opinion, the Court will deliver a further judgment; otherwise the order will be as proposed by Sir G. Rose.

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PELL, J. :— The impression of my mind is, that the justice of the case is with these respondents; but the case of *Stratton v. Hale* may alter my opinion.

CROSS, J. :— The argument on the part of the assignees deserves great consideration. The parties litigant are the creditors and the bankrupt's family. They are two distinct classes of creditors and *cestuique trusts*. It is contended, that all the interest during the life of the bankrupt *must* be taken from one set of *cestuique trusts* and given to the other.

There was an obligation on the part of the bankrupt to pay 3000*l.*? Does the obligation pass to the creditors? Are they bound to make up the money?

I dare say the Court will agree.

The case then stood over for judgment. In the meantime, the registrar's minute book was examined, and the report of *Stratton v. Hale* was found to be in substance correct.

On the 27th of February, the Chief Judge delivered the unanimous opinion of the Court.

ERSKINE, C. J. :—

This was a petition presented by
the assignees of *Brown*, a bankrupt, stating, that the bankrupt had given to *Partridge* and *Copeland* a bond

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to secure 3,000*l.*; and by a marriage settlement of the same date the money so secured was limited to the husband for life, with remainder for the benefit of the wife or her appointee, and subsequent limitations over. The petition further stated, that the marriage took place, and that the wife was living; that a commission of bankrupt issued against the husband in 1829, upon which he was declared bankrupt; that the trustees had been admitted to prove for 3,000*l.*, and that a dividend had been declared of 8*s.* 9*d.* in the pound, which amounted upon the sum proved to 1,225*l.* The prayer of the petition was, that the trustees might be directed to invest the dividends in government securities, and pay the interest to the assignees during the life of the husband.

The first part of this prayer was not resisted by those who appeared for the wife and children; but it was contended, that the interest upon the dividends, when invested, should not be paid to the assignees, but be left to accumulate until the whole amount of 3,000*l.* should be made up.

Many authorities were cited in support of the petitioners, and it was insisted by their counsel that there was no precedent which authorized the retention of the interest by the trustees on behalf of the parties interested under the trusts of the settlement.

The cases cited were, *ex parte Mitford* (a); *Stratton v. Hale* (b); *ex parte Verner* (c); *ex parte Smith* (d); *ex parte Groom* (e); *Priddy v. Rose* (f); *Pye v. Daubez*. (g)

The Court has taken time to consider the question, and to look into the authorities. Having done so, they

(a) 1 *Bro. C. C.* 698.(b) 2 *Bro. C. C.* 490.(c) 1 *Ba. & Be.* 260.(d) 1 *Cooke, B. C.* 223.(e) 1 *Atk.* 114.(f) 3 *McCr.* 86.(g) 3 *Bro. C. C.* 395.

are of opinion that the trustees should be allowed to retain the interest upon the dividends as it arises, until the whole sum of 3,000*l.*, secured by the bond, and subject to the trusts of the settlement, is made up, and then that the interest upon the whole amount should be paid to the assignees during the life of the husband.

The case of *ex parte Smith* (a) was decided without considering the point. The same observation applies to *ex parte Verner*. (b) The only case cited for the petition, in which the point has been considered, is *Stratton v. Hale* (c), which is certainly an authority for the petitioners; but the ground of the decision in that case was, that the assignees did not stand in the same situation, subject to the same equities, as the bankrupt. But the Court are of opinion, that the assignees do represent the bankrupt in all respects, and are bound by his obligations.

In *ex parte Mitford* (d), Sir *W. Grant*, the Master of the Rolls, states the question thus: "Is an assignee under a commission of bankruptcy placed in a different situation from that of the bankrupt himself? I have always understood the assignment from the commissioners, like any other assignment by operation of law, passed his rights precisely in the same plight and condition as he possessed them. Even where a complete legal title vests in them, and there is no notice of any equity affecting it, they take, subject to whatever equity the bankrupt was liable to."

It is admitted by those who argue for the petitioners, that if the question were between the husband and the assignees, the husband could not claim any interest upon the dividends until he had fully paid up the whole sum

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(a) *C. B. L.* 212.

(b) 1 *Ba. & Be.* 260.

(c) 2 *B. C. C.* 490.

(d) 9 *Ves.* 99.

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secured. If so, and if the assignees take, subject to the same equity as the bankrupt, it follows that the trustees are entitled to keep the dividends until the whole sum is made up. The case of *Stratton v. Hale* was not fully considered, and has never been acted upon as an authority. The case of *Ramsay v. Ramsay* is an express authority the other way. We are moreover authorized to state the opinion of that member of the court who is most versed in the doctrines and practice of bankruptcy, that it has always been the course pursued in these cases to permit the trustees to retain the dividends. As to costs, each party will take them out of their estates. The dividends must be invested, to accumulate until they make up the trust fund, and liberty may be reserved for each party to apply. (a)

(a) It may be acceptable to the profession to be furnished with a case which in point of authority supports the present judgment. It occurred in 1816, and is extracted shortly from the order book in bankruptcy.

Ex parte MAISTER, in the matter of RAMSAY.

The petition stated a settlement made by the bankrupt upon his marriage, and a bond given to the petitioners in the penalty of 50,000*l.*, conditioned to secure the payment of 25,000*l.*, which was to be invested upon the trusts of the settlement. The trusts were to permit the bankrupt, during the joint lives of him and wife, to receive the in-

terest of the 25,000*l.*, and after his death to pay the interest for life to the wife if she should survive, and upon her decease, for the executors and administrators of the bankrupt. The petition then stated, that the whole sum was due, and that a joint commission of bankrupt had issued against *Ramsay*. The petition prayed, that the petitioners might prove against the separate estate, and retain the interest accruing, or dividends, during the joint lives of the bankrupt and his wife, until the whole of the principal sum of 25,000*l.* should be received, and invested upon the trusts of the settlement: which was ordered accordingly.

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Ex parte LYNCH. — In the matter of LYNCH.

V. C.
March 10,
1832.

THIS was a petition by the bankrupt to supersede the commission.

After having been in prison twenty-one days he commenced trading, and he continued in prison for a year.

The petitioning creditor caused the commission to be issued upon the act of bankruptcy by lying in prison.

A commission cannot be supported by an act of bankruptcy by lying in prison, unless the trading were before the imprisonment.

Mr. *Knight* and Mr. *Tamlyn* for the petitioners.

Mr. *Pepys* and Mr. *Montagu* for the respondents.

The VICE-CHANCELLOR said, “ That section 5. related only to an act of bankruptcy committed by a trader, who, previous to his being committed to prison, was in trade. The words being, that if any such trader, having been arrested or committed to prison for debt, or on any attachment for nonpayment of money, shall, upon such or any other arrest or commitment for debt or nonpayment of money, or upon any detention for debt, lie in prison for twenty-one days, or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention: provided that if any such trader shall be in prison at the commencement of this act, such trader shall not be deemed to have committed an act of bankruptcy by lying in prison, until he shall have lain in prison for the period of two months.”

And upon this ground he was pleased to supersede the commission.

Ex parte FLETCHER.

C. R.
Feb. 28,
1832.

An equitable mortgagee, who applies for a sale, will not be allowed the costs of an action at law brought for the mortgage money.

MR. STEWART applied for an order for the sale of an equitable mortgage: the mortgagee had commenced an action at law for the recovery of the same debt as was secured by this equitable mortgage, and the petition further prayed that he might be allowed the costs of such action.

But the court refused so to order, on the ground that instead of coming here the mortgagee might have proceeded with his action, when he would have recovered his costs as of course at law.

C. R.
Feb. 28,
1832.

The solicitor for a judgment creditor should not act as commissioner.

Ex parte SHUM.—In the matter of ROSE.

THE solicitor for an execution creditor, who had levied on the day on which the act of bankruptcy was committed, was appointed one of the commissioners.

His Honor the Chief Judge said, "I desire that this gentleman may be informed that the Court strongly intimate to him that it will be highly improper for him further to act, except from necessity, as a commissioner in this case;" and Mr. Justice Cross added, "that he joined in the admonition of the Chief Judge; and that if he did any further act it would be at his peril. He is a solicitor of this court, and if he do act, and we hear of it, we shall not be at a loss how to proceed."

C. R.
Feb. 27,
1832.

If the barristers in a country commission are absent, an order may be obtained for the others to hold the third meeting.

Ex parte JAMES.—In the matter of HUGHES.

IN a country commission, the two barristers, who were of the quorum, were absent on the circuit.

Ordered, that the three other commissioners might hold the third meeting.

2 Grant vol 152.

Ex parte TODD.—In the matter of TURNER.

MR. RICHARDS applied to amend a fiat: the fiat had been opened.

C. R.
March 10,
1832.

A fiat cannot be amended after it has been opened,

Per Curiam.—There is a difficulty created by the new act. The fiat is now a *record* of the court; and it is an established practice of the courts of common law, not to amend a record, unless there be something to amend by, and after a commission has been opened, it was, before the new act, the practice not to amend. (a)

Ex parte PAYNE.—In the matter of SAUNDERSON.

THIS was a petition by a creditor for more than 20*l.*, to have a bill of costs, which had been taxed by the commissioners subsequently to the choice of assignees, taxed by a master.

V. C.
L. I.
Feb. 7,
1831.

Upon a petition by a creditor, under 6 Geo. 4. c. 16. s. 14., to retax a solicitor's bill, it is not necessary to serve the assignees.

Mr. Knight and Mr. Turner for the petition.

Mr. Rose, for the solicitor, objected, that the assignees ought to have been served, as he only appeared for the solicitor whose bill was sought to be taxed, and he was not the present solicitor under the commission; and referred to section 14 of 6 Geo. 4. c. 16., *ex parte Hickman, re Parker*, 1 M. & M. 232. (b)

The VICE-CHANCELLOR held, that it was not necessary to serve the assignees, and made the order for taxation. (c)

(a) See in *re Barber*, 2 G. & J. 81; in *re Stammers*, Mont. & Mac. 290.

(b) The cases respecting taxation of bills under this clause are, *ex parte Barlow*, Mont. 87; *Pocock v. Russell*, 4 C. & P. 14; *Taylor v. M'Gaugan*, 4 Car. & P. 96; *ex parte Palmer*, 2 G. & J. 34; *ex parte Heyden*, 2 G. & J. 52; *ex parte Gore*, 2 G. & J. 117.

(c) The words of section 14, applicable to this point, are as follow: "Provided that any creditor who shall have proved to the amount of twenty pounds or upwards, if he shall be dissatisfied with such settlement by the commissioners, may have any such costs and bills settled by a master in chancery, who shall receive for such settlement, and the certificate thereof, twenty shillings and no more."

In Order 228.

GENERAL ORDER.

C. R.
Feb. 29,
1832.

AT the sitting of the Court this day several petitions were called on, but the parties were not in attendance: whereupon

ERSKINE, C. J., observed, that the Court had resolved to adhere most strictly to the rule followed in the courts of common law, viz. to strike out every petition when the parties do not appear. If the petitioner only appears, the cause to be heard; and if respondent only is present, then the petition to be dismissed.

CASES

IN

BANKRUPTCY.

Ex parte CHUCK.—In the matter of J. C. STARKEY, W. STARKEY, and W. WHITESIDE.

THE facts and arguments in this case are reported *ante*, p. 364, *et seq.* The following is the short abstract of the case.

J. C. Starkey and *W. Starkey*, carrying on business as brewers in copartnership, admitted *W. Whiteside* as a dormant partner. It was stipulated by deed, that the stock and effects of the old firm, including the plant, &c. and book debts, should form part of the capital stock of the new copartnership; that *W. Whiteside* should be paid 10 per cent. on the capital advanced by him, and should not otherwise interfere. The business was carried on as before, in the names of *J. C. Starkey* and *W. Starkey* only, until the new firm became bankrupt. Upon petition of several creditors of the old firm, some of whom had notice that *Whiteside* was the dormant partner, it was held by the Vice-Chancellor that all the personal chattels of the new firm were within the order and disposition of *J. C. Starkey* and *W. Starkey*, and ought to be administered in the bankruptcy as the estate of the two.

Traders in copartnership having admitted a dormant partner, his share in the joint stock is in the order and disposition of the ostensible partners, and distributable as such; but the creditors of the new firm and creditors of the old firm, who had notice that a dormant partner had been admitted, are entitled to prove their debts *pari passu* with the other creditors of the old firm.

Dece 34, 3
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2 Hunt & Co, 2187-757.
3 Dece 26 209.
3 Hunt & Co 1175

1832.

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Ex parte
 CHUCK.
 In the matter
 of
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 and others.

The case was argued before the Lord Chancellor, the Chief Justice of the Common Pleas, and Mr. Justice *Littledale*, upon appeal by the assignees from the order of the Vice-Chancellor, and stood over for consideration. The opinion of the Judges was now delivered by

The CHIEF JUSTICE of the Common Pleas :—

The first question to be considered is, whether *William Whiteside* ever became a partner with *J. C. Starkey* and *W. Starkey*, either as between themselves or with respect to third persons; that is, whether there ever was any joint partnership stock belonging to all these three persons. We are of opinion, that, by the deed of the 20th July 1820, confirmed by that of 2d March 1821, which was executed after *Whiteside* came of age, *Whiteside* did become a partner with the two *Starkeys*, both as between themselves and also with regard to third persons; and that by the express terms of the deed of 20th July 1820 there was a partnership stock created, in which they had a joint property; and that although *Whiteside* had not any definite aliquot proportion of the profits, yet that he was entitled to an account of the profits as between themselves, so as to get his 2,000*l.* or 2,400*l.* a year, as the case might be, out of the clear profits; and he was to all intents and purposes a partner, though his name did not appear to the world; and as against such joint parties, that a joint commission against all the three might be well supported.

Whiteside being thus a partner, but unknown as such to the world, any creditor of the three might at his election have maintained an action either against the two *Starkeys*, the known partners, or against them and *Whiteside* jointly, as appears by the case of *De Mantort v. Saunders* and others, 1 *Barnwell & Adolphus*, 398; *ex parte Hamper*, 17 *Vesey*, 463; and *ex parte Norfolk*, 19 *Vesey*, 455. And if an action had been

brought against the three partners, it is clear that the joint effects of the partnership might have been taken in execution.

So also, generally speaking, the joint effects of the partnership would be distributable amongst the joint creditors, under a joint commission of bankruptcy against the three; and unless there be something particular in this case to vary it from such general principles, we should be of opinion, that the joint creditors of the three are entitled to have the partnership effects divided amongst them.

Thus, then, stands the claim of the joint creditors of the three partners.

The claim of the creditors of the two *Starkeys* under the old partnership must next be considered.

It is contended, on the part of those creditors, that after the partnership with *Whiteside*, who was a secret partner, the two *Starkeys*, with the consent and permission of *Whiteside*, who had a share of the joint property, had his interest in such joint property in their possession, order, and disposition, and of which they were reputed owners, and took upon them the sole alteration and disposition as owners; and that under the 6 G. 4. c. 16. s. 72., which follows the 21 Jac. 1. c. 19. s. 11., they are entitled to have the benefit of that interest of *Whiteside* under the commission.

For that doctrine they rely on the case *ex parte Enderby*, 2 Barn. & Cress. 389, which they contend must be taken now to be the law on the subject, and to have settled all the former conflicting cases. To the authority of that case we entirely subscribe.

In that case the partnership had expired by effluxion of time before the commission issued; in the present case it continues up to the date of the commission. But we cannot think that circumstance makes any difference

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in principle between the two cases; and, in the present instance, if *Whiteside* had been solvent, and able to pay all the creditors of the three, and a commission of bankrupt had issued against the two *Starkeys*, we do not think that he could have claimed to be entitled to his share of the joint effects, any more than *Enderby* could in his case.

It may be argued, however, that the rule of law laid down in that case may well apply against the solvent partner himself, who is in default by suffering his share to remain in the possession and order of the bankrupt, and who therefore is excluded by the policy of the law from claiming any thing to the prejudice of creditors whom he may have been in part the means of misleading; but that it forms a very different question, whether the same rule should be allowed to hold where the interest of the creditors of *Whiteside* is affected by its application, and whereas in the present case the creditors of the three have trusted the firm, when *Whiteside's* 24,000*l.* formed part of the capital. But, upon the best consideration we can give to the subject, we think the principle of the case *ex parte Enderby* may and ought to be extended to a case circumstanced like the present.

The question therefore arises, whether, if the old creditors are entitled to treat this as a case within the 72d section of 6 Geo. 4., they may not exclude all other persons, on the ground, that if the funds of *Whiteside* have, under the circumstances, been placed in the hands of the two *Starkeys*, contrary to the policy of the law, no persons but the old creditors can prove. But we think they are not to have that privilege.

In fact, the new creditors have a better right upon principle than the old creditors, because the new creditors trusted the firm on the faith of their apparent funds,

including *Whiteside's* capital; whereas the old creditors never did trust them upon the faith of these funds, but only forbore to sue them upon the faith of their apparent stability. And unless there be some principle which forbids different classes of creditors claiming upon the same funds, we think both sets of creditors ought to be permitted to prove; that is, the new creditors on the ground of the funds belonging to persons whom they certainly trusted, and the old creditors on the ground of the two *Starkeys* being the apparent owners of the whole.

Still further, if the creditors of the old firm claim to exclude the creditors of the new firm, another answer may be given, to which we have already referred; viz. that as *Whiteside* was a secret partner, the creditors of the new firm might have brought actions or sued out a commission of bankrupt against the two *Starkeys* (according to the cases *De Mantort v. Saunders* and others, *ex parte Hamper*, and *ex parte Norfolk*, before referred to). And then, as *Whiteside* was a dormant partner, and the two *Starkeys* were the apparent owners, the new creditors might have insisted upon *Whiteside's* share being distributable under such a commission, and consequently would have the same right to insist upon the apparent ownership as the old creditors have.

We are therefore of opinion, upon the whole of the case, that both the creditors of the *Starkeys* by themselves and also the creditors of the two *Starkeys* and *Whiteside* jointly should be admitted to prove *pari passu* upon the joint estate of the three.

Then, supposing the old creditors are entitled to prove upon the joint estate, it is to be considered whether those who had notice of *Whiteside's* becoming a partner can be admitted to the benefit of the proof. And upon that point, inasmuch as the proof is upon the ground of apparent ownership in the two *Starkeys*, we think it can

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make no real difference whether the old creditors know of the change or not, inasmuch as none of the old creditors trusted the firm while *Whiteside's* property was in it, and therefore the knowing or not knowing of the change seems to us to make no difference.

We see, therefore, no objection to those particular creditors being also allowed to prove as well as the rest.

Upon the delivery of this opinion the order of the Vice-Chancellor was affirmed.

3 Decy & 1566. 4 Exch. 536

L. C.
Lord
C. J. Tindal.
Mr. J.
Littledale.
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S., upon his marriage, covenanted that his executors, twelve months after his death, should pay the trustees 4,000*l.* upon trust, to pay the interest to S. during his life, and upon his death to his wife if living, and upon the death of the survivor to the children of the marriage, if any, and if no children should become entitled under the limi-

THE question in this case arose out of the provisions of a marriage settlement, by which the husband contracted, in certain events, that his executors, &c. should pay a sum of 4000*l.* to trustees for the benefit of his intended wife. The facts and arguments are stated, *ante*, p. 375, *et seq.*

The case having been argued before the Lord Chancellor, the Chief Justice of the Common Pleas, and Mr. Justice *Littledale*, the Judges being in attendance in the Court of Chancery, on the 10th May 1832, their opinion was delivered as follows, by

The CHIEF JUSTICE of the Common Pleas: —

In this case, which arises upon a proof claimed to be made by trustees under a marriage settlement, it is unnecessary to state the facts, which are completely in the knowledge of this Court.

tations of the settlement, then to the survivor of the husband and wife: — Held, that this was a contingent debt, upon which a value might be set under 6 Geo. 4. c. 16. s. 56. and that it might be proved by the trustees upon the bankruptcy of the husband.

1 Mont & Bl. 222 - 231.
3 Decy & 1566.
1 Mont & Bl. 332
3 Ad & Ell 849
1 Mont & Bl. 552.

There are two questions in this case: first, whether the bankrupt has contracted a debt payable on a contingency, within the meaning of the 56th section of 6 Geo. 4. c. 16.; and secondly, supposing that he has done so, whether the commissioners can set a value upon the debt, so as to make it the subject of proof under the commission.

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On the first question, it is contended, on the behalf of the assignees, that the contract entered into by the bankrupt is not a debt, but merely a covenant that the executors of the bankrupt shall pay a sum of money on a collateral event; and that the only effect of that contract is to create a charge on his assets, and that such was all that the parties themselves contemplated by the settlement, as the bankrupt himself could never have been liable to pay the money, that the parties themselves took the chance of what the assets might produce, a chance which in some cases might be more beneficial to the wife and children, because if the husband should become bankrupt, and afterwards acquire property, they would have the benefit of the provision in full, instead of a dividend, very much diminished as it must be by the calculation of the contingency.

But we are of opinion that the contract contained in the settlement is a debt which the bankrupt has contracted within the meaning of the 56th section of the late bankrupt act. A covenant to pay a sum of money constitutes a debt, and an action of debt so called may be maintained upon it. (1 *Leonard*, 208; *Comyn's Digest*, Title Debt, A 4; *Ingledew v. Cripps*, Lord *Raymond*, 814.) For though in the case last cited there was a penalty, yet the language of the Court is, that debt will lie on a covenant to pay a sum of money, and it is a common practice

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to draw declarations in debt on a covenant to pay a sum of money.

If a man covenants that his executors shall pay a sum of money after his death, that also appears to us to create a debt, and we think it just as much so as if he himself had covenanted to pay it. (*Vide Plumer v. Marchant*, 3 Burr. 1380.) In that case the testator covenanted that he would leave by his will, or that his executors or administrators should within six months after his death pay, a sum of money to trustees for the benefit of his wife and children. An action being brought against the administrator on a bond of the testator, he pleaded *plene administravit*. The question was, whether he could retain the money so covenanted to be paid; and all the Court held that this was debt which might be retained. It is true there was a penalty on which debt would lie, but the Court only noticed that incidentally, and it is plain that their judgment would have been the same if there had been no penalty.

There may be a doubt, whether an action of debt, technically so called, would lie against executors upon such a covenant, because debt would not have lain against the testator himself (*Wentworth's Office of Executors*, 232, and *Perrott v. Austin*, Cro. Eliz. 123.); though Lord Mansfield, in *Plumer v. Marchant*, above cited, speaks very lightly of the latter case of *Perrott v. Austin*, and even in the case itself there is a note at the end making a *quære* to one of the reasons.

But those authorities are merely to the form of actions, whether it should be debt or covenant, and do not affect the substance of the case, which is, whether a sum of money is payable by the contract; and in the case referred to in *Leonard's Reports* it is said, that the word

covenant sometimes sounds in covenant, sometimes in contract, according to the subject matter.

The case of *Lee v. D'Aranda*, 1 *Ves.* 1, and 3 *Atkins*, 419, was cited to shew, that a covenant that a man's executors should pay was the same as a covenant to leave a sum of money, and that the latter did not create a debt; but without considering whether at law at least a covenant that a man's executors shall pay be for all purposes the same thing as a covenant that he will leave, the case of *Lee v. D'Aranda* was upon a question whether a widow should have the benefit of such a covenant, and also of the distributive share *pro tanto* of her husband's estate, and was a question on the point of double satisfaction.

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Many similar cases have occurred, all of which were considered in *Goldsmid v. Goldsmid*, 1 *Swan.* 211.

But we do not form our opinion upon the technical ground, that an action of debt will lie in point of form, but upon the substance and effect of an absolute covenant that a man's executor's shall pay a sum of money to certain persons upon certain trusts, which in our opinion constitutes a debt.

Then if it be a debt contracted there is no doubt but it is payable on a contingency.

There is one contingency as to the distance of time at which it is payable, depending on the life of the bankrupt; and another, whether the wife or any children be alive at the death of the bankrupt, so as to be entitled to the benefit of it.

It is possible that the contingency as to who shall have the benefit of it may never happen at all, which would be the case if the wife should be dead, and there should be no children at the death of the bankrupt.

But it has been urged that this is not a contingent debt within the meaning of the Act of Parliament, be-

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cause it is uncertain whether the debt will ever be payable or not. We think, however, that uncertainty affords no reason why it should not. Neither the words nor the spirit of the act require such a restriction upon contingent debts.

It surely would put too narrow a construction upon the words of the act, to hold that they are to be confined to cases where the event upon which the contingency rests must happen some time or other, and that because such event may never happen the debt is not to be taken as payable on a contingency; for though the debt may never be paid, it is nevertheless payable if the contingency does happen, and as such it is strictly and properly speaking payable on a contingency.

One of the classes of contingent remainders is where the contingency may never happen at all; and it is to be presumed that the legislature in using the word contingency meant that it should apply to such cases as upon other occasions are held to fall within the meaning of the term.

Before the late Act of Parliament, a very extensive set of creditors claiming under marriage articles had, on various occasions, applied to prove debts under commissions of bankrupt, as appears by *Tully v. Sparks*, 2 Lord Raymond, 1545; *ex parte Caswell*, 2 P. Wms. 497; *ex parte Greenaway*, 1 Atk. 113; *ex parte Groome* and *ex parte Winchester*, 1 Atk. 115; *ex parte Mitchell*, 1 Atk. 120; *ex parte Barker*, 9 Ves. 110; *ex parte Alcock*, 1 Ves. & B. 176; *ex parte Taaff*, 1 Glyn & J. 110, and that class of cases.

In many of these cases expressions are used of the hardship of trustees under marriage settlements not being able to prove under commissions of bankrupt; and there can be little doubt but that the legislature had in view the numerous class of cases of trustees under

marriage settlements, and we think that the words of the present Act of Parliament are sufficient to reach these cases.

But the principal difficulty which has been urged in argument is, that no valuation can be made by the commissioners within the meaning of the act.

If the contingency depends upon the lives of persons in existence, and the order of time in which the various individuals may die, such contingencies are clearly reducible to a matter of calculation, and a valuation may be made of the present worth of the debt; but if the valuation depends upon particular events, which may or may not take place, and upon the lives of persons not now in existence, and where it is uncertain whether any such persons will ever come into existence, and where if any do it is still uncertain how many there may be, and the valuation (if any) is to be made upon a contingency depending on such complication of events, then indeed it may be admitted that no valuation could be set upon it, as there would be no possibility of bringing such a case within any rules of calculation; and in this particular case, if the valuation must necessarily depend on how many persons there should be, connected with there being any children of this marriage, or upon the number of such children, if any, or upon the time of the death of these uncertain children, then we should have thought that no valuation could be made of the debt in question, so as to admit it to proof.

But we think the valuation is not to depend upon the fact of there being any future children of the marriage, or upon the time of their death.

It appears to us, that such calculation ought to be made merely with reference to the time of the bankrupt's death; and that the valuation is to be simply this, the present worth of 4,000*l.* payable twelve months after the death of the bankrupt.

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The settlement contains a positive covenant, that the debt is to be paid to the trustees at the end of twelve months after the death of the bankrupt.

The trustees are therefore entitled to receive the whole at that time, as an absolute debt to themselves: they are directed, after receiving it, to lay out the money in the securities mentioned in the settlement, and to apply the interest and principal in the way therein directed; and, in the first instance, the wife is to have the whole for her life.

That would have been the state of things if *Wynne* had not become bankrupt. Then how is it altered by the bankruptcy? Suppose the debt to the trustees had not been contingent, and had been payable immediately, the trustees would have proved for the whole debt, without reference to the fact whether there were children or not.

Suppose the debt had been payable at a future day certain, then they would have proved for the whole debt, deducting a rebate of interest, and that also without reference to the fact whether there were children or not.

But this debt being payable at a future day which is uncertain, there can be no rebate of interest, and therefore a value is to be set upon it, and that value, it seems to us, should be governed upon the principle that the value should be put upon the whole debt, without reference to there being children.

There being children or not ought not to affect the right of the wife to the interest for life in the first instance, and she cannot have the benefit of the whole debt unless the value should be taken in the way we have mentioned.

If there are children, the trustees will divide the money amongst them, according to the terms of the settlement; and as to these also, they are entitled to have the benefit of the whole debt, subject to the deduction as to the

valuation; and if there are no children, the wife will take the debt by survivorship, reduced as it will be by the deductions before alluded to, and by the receipt of dividends under the commission only, instead of the debt.

In the event of the wife dying before the husband, and there being no children, there will be nobody to take, and then it will revert back to the husband's estate. One argument adduced against admitting the present proof is, that this may, in certain events, be a proof for the benefit of the husband, and that therefore it cannot be received.

If a proof were made for the immediate benefit of the husband, it would be nugatory to allow it to be made, because the benefit of it must go back to the estate. But if, in the multiplied limitations of a marriage settlement, some benefit may eventually arise to the husband, there can be no reason why the whole proof should on that account be rejected.

Here are two ways by which the husband might be benefited: one, if the husband should survive the wife, and there should be no children.

In that case the money received as the dividends would go back to the husband's estate; but then the proof would not be considered as having been made for the benefit of the husband, but the whole proof would fall to the ground, and be as if it had never taken place; because the trusts of the settlement, as far as relate to the sum of 4,000*l.*, would not come into operation till after the death of the husband.

Again, if the wife should die in the lifetime of the husband, and there should be children who survived the husband, but they should die before they acquired vested interests, then the husband having survived the wife, his executors would be entitled; but that collateral contingent interest to his executors could not be consi-

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dered as rendering the proof a proof for the benefit of the husband, so as altogether to exclude it: on the contrary, such beneficial interest vesting in the husband's executors would form part of the estate of the bankrupt.

The case of *ex parte Grundy*, 1 *Montagu & Mac Arthur*, 293, was nearly similar to the present, and in that case the trustees were allowed to prove. But as the objection now under consideration was not made there, and the case was determined on the retrospective operation of 6 G.4. c. 16. that cannot be adduced as an authority.

Upon the whole, we think the demand of the trustees is proveable upon the grounds and principles which we have above stated.

The decision of Lord *Lyndhurst*, 1 *Mont. & Maca.* 422, reversing the decision of his Honour the Vice-Chancellor, 1 *Mont.* 415, was over-ruled. The costs of all parties to be paid out of the bankrupt *Smith's* estate. (a)

(a) Ordered, that the order of Lord Chancellor *Lyndhurst*, pronounced on the 31st day of July 1830, be reversed, and declare, that the petitioner is entitled to prove against the estate of *Smith* the value of the 4,000*l.*, payable twelve months after the death of the bankrupt, such value to be taken as the same existed at the date of the commission, and refer it to the commissioners to ascertain and fix the amount of such value; and the order directed that the petitioner should receive the dividends to be from time to time declared on such proof, and that he should invest the same in the purchase of bank three per cent. annuities, and receive the dividends from time to time to accrue due on such bank annuities, until the expiration of twelve months from the death of the said *Wm. W. Smith*; and that they do in like manner invest the dividends to be so received in the purchase of like bank annuities, the petitioner to stand possessed of all the bank annuities to be purchased as aforesaid, and of all dividends thereon, or proceeds thereof, upon such trusts as are declared of the said sum of 4,000*l.*, and the interest, dividends, and produce thereof, by the deed of settlement; and that the assignees pay the costs of all parties of the several petitions out of the said bankrupt *Smith's* separate estate.

BENJAMIN LESTER LESTER and JOHN BINGLEY GARLAND, — — — Plaintiffs; GEO. GARLAND, JOHN FRYER, SAMUEL SPRATT STRONG the younger, PETER JOLLIFFE, WILLIAM JUBBER SPURRIER, CHRISTOPHER SPURRIER and ANN his Wife, and AMY ANN SPURRIER, Defendants.

BY an indenture, dated the 21st of September 1814, and made between *George Garland* of the first part, *Amy Garland* of the second part, *Christopher Spurrier* of the third part, the plaintiffs, and the defendants *Peter Jolliffe* and *William Jubber Spurrier*, of the fourth part, after reciting that a marriage was agreed on and intended to be solemnized between *Christopher Spurrier* and *Amy Garland*, and that *Amy Garland*, as a legatee under the will of Sir *John Lester* knight, deceased, was entitled to 1,000*l.*, and that *Christopher Spurrier*, in case the marriage should take effect, would in right of *Amy Garland* become entitled to the said sum of 1,000*l.* when *Amy Garland* should attain the age of twenty-one years; and further reciting, that *George Garland*, in consideration of the natural love and affection which he had and bore towards *Amy Garland* his daughter, and for the purpose of augmenting her fortune and estate as therein mentioned, had agreed to advance in favour of her, by and out of his own proper funds and monies, 4,000*l.*, to be paid to *Christopher Spurrier*, who on his part had agreed, in consideration of the intended marriage, and in order to make a provision for his said intended wife and the issue of the marriage, to advance 33,333*l.* 6*s.* 8*d.* three per cent. reduced bank annuities, to be invested and settled in the names and upon the trusts therein-after mentioned and declared; and also reciting, that the

In a marriage settlement, where part of the trust fund consists of the wife's fortune, a limitation to the husband until bankruptcy, and upon that event for the benefit of the wife and children, is valid to the extent of the wife's proportion of the fund.

A deed executed may be construed according to the intent of the parties, to be collected from the recitals and provisions of the deed.

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said 4,000*l.* had accordingly been advanced and paid by *George Garland* to *Christopher Spurrier*, who had transferred 33,333*l.* 6*s.* 8*d.* three per cent. reduced bank annuities unto and that the same was then standing in the names of the plaintiffs *B. L. Lester* and *J. B. Garland*, and the defendants *Peter Jolliffe* and *William Jubber Spurrier*, in the books kept by the Governor and Company of the Bank of England; it was declared and agreed by and between the parties thereto, in consideration of the intended marriage, and for other the considerations and purposes therein-after expressed, and *Amy Garland* thereby declared, consented, and agreed, that the trustees therein named, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, should stand and be possessed of, interested in, and entitled to the said sum of 33,333*l.* 6*s.* 8*d.* three per cent. reduced annuities, and the dividends, interest, and annual income thereof, upon certain trusts therein mentioned, until the intended marriage should be had and solemnized, and from and immediately after the solemnization thereof upon trust that the trustees, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, should pay the interest, dividends, and annual produce of the said 33,333*l.* 6*s.* 8*d.* three per cent. reduced annuities to, or permit the same to be received by, *Christopher Spurrier* and his assigns for and during his natural life, or until by or in consequence of any unforeseen misfortunes in trade or otherwise it should appear that *Christopher Spurrier* should become a bankrupt or insolvent, if ever such event should happen; and from and after the death of the said *Christopher Spurrier*, or from and after his bankruptcy or insolvency, if such misfortune should ever happen to him, should retain, pay, and apply the interest, dividends, and annual

produce of the said 33,333*l.* 6*s.* 8*d.* three per cent. reduced bank annuities, to or for the benefit of *Amy Garland* and her assigns, during her natural life, and in particular should, from time to time during the then remainder of the joint lives of *Christopher Spurrier* and *Amy Garland*, in the event of any such misfortune as the bankruptcy or insolvency of *Christopher Spurrier*, pay the said interest, dividends, and annual produce for the sole and particular use of *Amy Garland* and her children (if any), separate and apart from and exclusive of her said intended husband, and so as not to be in any manner subject or liable to his debts, controul, or engagements, and without any right or power in *Amy Garland* to anticipate or assign or in anywise charge or affect the growing payment thereof, and the receipts in writing of *Amy Garland* alone, notwithstanding her coverture, to be from time to time good and sufficient discharges for the same; and upon further trust, that after the death of *Amy Garland*, subject nevertheless and without prejudice to the right of *Christopher Spurrier* to receive the interest, dividends, and yearly proceeds of the said stocks, funds, and securities until he should become a bankrupt or insolvent, should such an event happen, either in her lifetime or after the death of *Amy Garland*, the trustees, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, should stand and be possessed of and interested in the 33,333*l.* 6*s.* 8*d.* three per cent. reduced bank annuities, and the interest, dividends, and annual produce thereof, in trust for all and every or such one or more exclusively of the other or others of the children of *Christopher Spurrier* by *Amy Garland*, or in trust for all and every or such one or more exclusively of the other or others of the issue born in the lifetime of *Christopher Spurrier* and *Amy Garland*,

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or the survivor of them, if any such child or children, or in trust for all and every or such one or more exclusively of the other or others of such child or children, and for every and such one or more exclusively of the other or others of the issue born as aforesaid of any such child or children as *Christopher Spurrier* in his lifetime, or *Amy Garland*, his intended wife, after his decease, in case she should survive him, should by will appoint; and in default of and subject to such appointment, if there should be but one child of *Christopher Spurrier* by *Amy Garland*, the said sum of 33,333*l.* 6*s.* 8*d.* three per cent. reduced bank annuities, and the interest, dividends, and annual produce thereof, to be for the portion of such only child, to be an interest vested at twenty-one or marriage.

The settlement also contained a proviso, that it should be lawful for the trustees, and the survivors or survivor of them, or the executors, administrators, and assigns of such survivor, after the death of *Christopher Spurrier*, or from and after his becoming a bankrupt or insolvent, in case the same should ever happen, and after the death of the said *Amy Garland*, to pay and apply the whole, or such part as they the said trustees, or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, should think fit, of the interest, dividends, and annual produce of the portion or respective portions to which any child or children or issue of the said intended marriage should or might for the time being be entitled in expectancy, for or towards his, her, or their maintenance and education respectively. And it was thereby agreed and declared, that if *Christopher Spurrier* should happen to become bankrupt or insolvent, and should survive *Amy Garland*, then and in such case, from and after such bankruptcy or insolvency of *Christopher Spurrier*, and the death of *Amy Garland*, the

trustees, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, should, during the then remainder of the life of *Christopher Spurrier*, pay the whole of the interest, dividends, and annual produce of the portion or portions to which any child or children of the intended marriage, who should have attained the age of twenty-one, or married with such consent as aforesaid, should or might for the time being be entitled (subject only to any such appointment being made to the contrary as aforesaid) under or by virtue of the said indenture, of and in the trust monies, stocks, funds, and securities, to such child or children respectively, for his, her, or their respective proper use and benefit. And it was also agreed and declared between and by the parties thereto, that if there should be no child or children or issue of the said intended marriage, or none who under or by virtue of the trusts therein-before contained should become entitled to the said sum of 33,333*l.* 6*s.* 8*d.* three per cent. reduced bank annuities, then and in such case the trustees, and the survivors and survivor of them, and the executors, administrators, or assigns of such survivor, should stand and be possessed of and interested in the said sum of 33,333*l.* 6*s.* 8*d.* three per cent. reduced bank annuities, and the then future interest, dividends, and yearly proceeds thereof, in trust for the survivor of them the said *Christopher Spurrier* and *Amy Garland*, and his or her executors or administrators. Nevertheless, in case *Amy Garland* should die in the lifetime of the said *Christopher Spurrier*, and at the time of the death of the said *Amy Garland*, or after that event, there should be such failure of issue of the intended marriage as therein-before mentioned, in such case, notwithstanding any thing therein-before provided or declared, it was thereby expressly provided, declared,

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and agreed, that if, at the time of such failure of issue as therein mentioned, *Christopher Spurrier* should be or should have been a bankrupt or insolvent, fifteen equal sixty-sixth parts (the whole into sixty-six equal parts to be divided) of and in the said sum of 33,333*l.* 6*s.* 8*d.* three per cent. reduced bank annuities, or of the stocks, funds, securities, or estates in or upon which the same should then be invested or laid out, should go and belong to and should be in trust for the next of kin in blood of *Amy Garland* at the time of her death, in the same or the like manner as if she had died intestate, and without ever having been married, and possessed thereof as personal estate. And it was further provided and declared, that the trustees, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, after the death of *Christopher Spurrier*, or after his bankruptcy or insolvency, in case the same should ever happen, and after the death of *Amy Garland*, should, in the mean time and until the said sum of 33,333*l.* 6*s.* 8*d.* three per cent. reduced bank annuities should vest absolutely in some persons or person under the trusts therein-before declared, have power to invest and accumulate the funds. And it was by the said indenture further agreed and declared, that the provision thereby made for *Amy Garland* was intended to be and was and should be accepted by her in lieu, bar, recompense, and full satisfaction of all dower, right, title, and claim of dower and thirds, and freebench or customary or widow's part, which she might have claim, challenge, or demand in, to, or out of all or any the manors, messuages or tenements, lands and hereditaments, whereof or wherein the said *Christopher Spurrier* then was or at any time during the said intended coverture should or might be seised of any estate of freehold or inheritance, or of any customary or

other estate or interest to which dower or freebench was incident.

Soon after the execution of this indenture the marriage between *Christopher Spurrier* and *Amy Garland* was solemnized, with the consent of *George Garland*, the father of *Amy Garland*, who was then an infant. In pursuance of the powers in the indenture for that purpose contained, alterations were from time to time made in the investment of the trust funds, and thereby the sum of 33,333*l.* 6*s.* 8*d.* three per cent. reduced bank annuities, which was originally invested in the name of the trustees upon the trusts of the indenture, was changed into the sum of 26,326*l.* 0*s.* 7*d.* three and a half per cent. reduced bank annuities.

Christopher Spurrier carried on the business of a merchant at Poole, in partnership with the defendants *Peter Joliffe* and *W. Jubber Spurrier*, two of the trustees; and on the 7th of July 1830 a commission of bankrupt was issued against *Christopher Spurrier*, *Peter Joliffe*, and *William Jubber Spurrier*, under which they were declared bankrupts; and the usual assignment of the bankrupts' personal estate was executed to the defendants *George Garland*, *John Fryer*, and *Samuel Spratt Strong* the younger, who were chosen to be the assignees of the said bankrupts' estates.

Amy Ann Spurrier was the only child of the marriage, and there never was any other child of the marriage who lived to attain the age of twenty-one years, or be married. The assignees having upon the bankruptcy of *Christopher Spurrier* claimed to be entitled to the dividends to accrue due on the whole of the trust fund of 26,326*l.* 0*s.* 7*d.* three and a half per cent. reduced bank annuities during the remainder of the life of *Christopher Spurrier*, and to the whole of the capital in the event of such failure of issue of the marriage as in the indenture

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mentioned, as before set forth, the plaintiffs, as trustees, filed a bill in the Court of Chancery against the assignees, their co-trustees who had become bankrupt, and the husband and wife and a child of the marriage, stating the marriage settlement, and the facts herein-before set forth, praying indemnity, and the direction of the Court in respect of the claims of the parties under the indenture of marriage settlement.

Sir *E. Sugden*, for the plaintiffs, left the question to the Court.

Mr. *Knight*, for the defendants *C. Spurrier* and *Anne* his wife, and their infant child.

The case will be argued on the part of the assignees on the supposed analogy to cases of proof in bankruptcy and cases of charge, which cases do not go to the extent now to be contended for. Such a charge will be sustained to the extent of the benefit derived from the wife's property, although such a charge might be considered fraudulent as far as the bankrupts' property is concerned. But this is a case of limitation which is new in *specie*. The property might have been limited, until the husband should alienate, and upon that event given over. Bankruptcy is merely a species of alienation. There is nothing illegal in the limitation over upon bankruptcy. The case of debt or charge may be different. There is nothing in the case, unless it is brought within the rule of contemplation of bankruptcy. In cases of proof *eo instanti* when bankruptcy happens the debt arises; so in cases of charge *eo instanti* the estate vests in the assignees.

At all events, the wife and child are entitled to the extent of 5,000*l*. *Ex parte Meagham*, 1 Sch. & Lef. 179; *ex parte Cooke*, Buck, 179; *ex parte Young*,

Buck 179, 3 *Mad.* 124. In all those cases the wife's fortune had become the husband's absolute property, yet the wife had her fortune back. The value of the wife's fortune must be given out of that which is taken away, the life interest of the husband. We ask, therefore, a reference to the Master, to ascertain how much in value of the husband's life interest is equivalent to the wife's fortune.

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Mr. G. Turner for the same parties: —

A charge to arise upon bankruptcy does not touch the case of a limitation in a marriage settlement. In *Higginbotham v. Holme* it was the case of an annuity charged upon an interest passing to the assignees, and the question was, whether a charge could be so created. In the present case the interest of the assignees never arises. It is more analogous to the case of *Dommett v. Bedford (a)*, where the limitation over was by a stranger. A limitation may be made to the separate use of the wife; why not upon the contingency of bankruptcy? The wife in this case is a purchaser.

In *Higginbotham v. Holme* it appears, on appeal, that the question as to the right of the wife was reserved. This does not appear in the report of the case. (b) In

(a) 3 *Ves.* 149. In this case *A.* by will gave an annuity to *B.*, directing that *B.*'s receipt only should be a discharge for it; that *B.* should not alienate it; and if he did, that it should cease and determine. *B.* became bankrupt, and the commissioners assigned the annuity, with the other effects, to the assignees. It was held that the annuity ceased.

Vice-Chancellor, and the following note extracted:

"*Higginbotham v. Holme*, May 6, 1812.—Decree affirmed, 'without prejudice to the plaintiff, *Sarah Higginbotham*, claiming the annuity on the death of her husband, or claiming any lien on her father's property he has covenanted to give her husband upon the death of the father.'"

(b) The registrar's book was examined by the direction of the

Reg. Lib. A. 1811. 1209.

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that case a covenant was entered into on the part of the wife's father, for the benefit of the husband.

In *ex parte Young* the Master of the Rolls notices the point, that it is not the species but the amount of the wife's fortune which is to be considered in these questions. If any money is paid by the wife, she is a purchaser of the whole.

Mr. *Pepys*, Mr. *Ellis*, and Mr. *Jacob* for the assignees: —

The doctrines upon this question may be classed under three heads: 1st, Where a trader gives a security, to be enforced in the event of a bankruptcy, the security is invalid. 2d, Where the wife, or a third person from whom the property moves, so settles it that in case of bankruptcy it shall revert to the wife, this a good settlement for the wife, or her friends may make any bargain as to her property to qualify the rights of the husband. 3d, Where a trader endeavours to settle his own property, to enjoy it so long as he continues solvent, but in the event of bankruptcy to go to persons who, while he continued solvent, had no right or interest, such a settlement is fraudulent, being against the spirit and policy of the bankrupt laws.

This case comes under the latter rule.

The first authority upon the subject is *Lockyer v. Savage*. (a) The distinction here attempted to be made on behalf of the wife is not sustainable. The same principle will apply where the property of the creditors is to be affected by limitation as much as by proof. In *ex parte Meagham* (b) Lord *Redesdale* says, justly, that a bond having a similar operation is in fact a provision by the husband for himself. The decision in *ex parte*

(a) 2 *Str.* 947.

(b) 1 *S. & L.* 179.

Murphy (a) is to the same effect. In *ex parte Young* (b) it is said, in the judgment, that the rule is established to prevent the obvious opportunity of fraud. In *Higginson v. Kelly* (c) the rule is laid down, "that a trader cannot upon his marriage so settle his property that in the event of his bankruptcy his wife shall have a provision out of it." The same principle was applied in *ex parte Oxley* (d) and in *Brandon v. Robinson*. (e) The distinction is between the settlement of the bankrupt's property and that of other persons. Lord *Eldon* in the last cited case says, property may be given to a man until he shall become a bankrupt. (f)

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The doctrine of fraudulent preference was created by the courts of equity; it occurs not in the acts relating to bankruptcy until the passing of the Bankrupt Court Act (g); that is the first statutory allusion to the case; but the doctrine was long before established. Even a trust for the benefit of all creditors is an act of bankruptcy. There is no agreement in any part of this settlement to settle any part of the wife's fortune. The 5,000*l.* is to be paid by the wife's relations to the husband. If there had been any such agreement, the wife could only have been entitled to a dividend upon the 5,000*l.*

The limitation is fraudulent; it matters not how it is effected. A man cannot limit over his own property upon his own alienation or bankruptcy; he cannot put it in trust against his creditors. *Phipps v. Lord Ennismore*. (h) *Higginbotham v. Holme* (i) was a case of property ceasing by limitation; so is *ex parte Oxley*. (k)

(a) 1 S. & L. 44.

(b) *Ante*, p. 479.

(c) 1 Ba. & Be. 255.

(d) *Id.* 257.

(e) 18 Ves. 429.

(f) See *Costa v. Rogers*, 7 Bing.

(g) 1 & 2 W. 4. c. 54. s. 82.

(h) 4 Russ. 139.

(i) 19 Ves. 88.

(k) 1 Ba. & Be. 257.

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What is extracted from the register's book in *Higginbotham v. Holme* is consistent with all that has been decided. The property was not then paid; when paid, the question would have arisen, whether the husband could claim the benefit of the covenant, without giving the wife what she was entitled to.

In *ex parte Cooke* it is treated as the fortune of the wife lent to the husband. (a)

Mr. Knight in reply: —

There is no legal decision that such a limitation as this would be bad. There should be a case for the opinion of a court of law, stating it as a case of legal limitation of freehold estate. In *Phipps v. Lord Ennismore* (b) the trust was to maintain the grantor. *Ex parte Cooke* contradicts the doctrine, that the property must be the wife's in specie.

The 5,000*l.* is at all events a payment on a consideration which has failed.

The VICE-CHANCELLOR: —

In this case it appears, that in a deed of settlement made upon the marriage of *Christopher Spurrier* with *Amy Garland* it is recited, that *Amy Spurrier* the intended wife was entitled, as legatee under the will of *Sir John Lester*, to a sum of 1,000*l.* when she should attain the age of twenty-one years, at which age, in the event of the marriage, the 1,000*l.* was to vest in *Christopher Spurrier*; it is then further recited, that *George Garland*, the wife's father, agreed to advance, for the benefit of *Amy* his daughter, the sum of 4,000*l.*, to be paid to *Christopher Spurrier*, who on his part, in consideration of the marriage, and in order to make a provi-

(a) See *ex parte Taaffe*, 1 G. & J. 110.

(b) 4 Russ. 139.

sion for his intended wife and the issue of the marriage, had agreed to advance 33,333*l.* 6*s.* 8*d.* three per cent. reduced bank annuities, to be invested and settled upon the trusts therein-after mentioned. The trusts declared were, that the trustees should be possessed of the stock, in trust to pay the dividends to the husband during his life, or until, by or in consequence of any unforeseen misfortunes in trade or otherwise, it might happen that he should become a bankrupt or insolvent, and, after the death or bankruptcy or insolvency of the husband, should pay the dividends to or for the benefit of the wife during her natural life, and in particular should, in the event of the bankruptcy or insolvency of the husband, during the remainder of the joint lives of the husband and wife pay the dividends for the sole and separate use of the wife and children. There are then, upon the death of the husband and wife, trusts for the children upon which nothing turns. There is, however, a proviso material to be stated, enabling the trustees, after the death or bankruptcy or insolvency of the husband, (the wife being then dead,) to apply the dividends upon the respective portions to which the children might become entitled, for the maintenance of the children, and eventually to pay the capital to the children according to the provisions of the settlement. It was then provided, in case the husband should survive the wife, and there should be a failure of issue, that, upon the bankruptcy or insolvency of the husband, fifteen equal sixty-sixth parts of the stock should go to the next of kin in blood of the wife.

The bill was filed to obtain a declaration by the Court as to rights of the parties under this settlement, upon the events which have taken place. There are in the books a great number of cases upon the subject,

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beginning with that of *Lockyer v. Savage* (a), a hundred years ago. The doctrine established by that case was, that property proceeding from and settled upon the husband during his life could not, upon a marriage settlement, be limited to go to the wife and children upon the bankruptcy of the husband, but that the wife's property might be so settled. It would be idle to travel through the multitude of cases confirming this doctrine which are to be found collected in any of the modern decisions.

In this case, if it had appeared expressly by the deed that the agreement was, that the wife's property should be invested in the purchase of stock, and that the husband should give so much from his own property as would purchase additional stock enough to make up the trust fund, it would have been clear beyond question, that, as to the wife's proportion of the money advanced, and that part of the trust fund in which it was invested, the settlement would be legal and valid; and as to the husband's proportion of the money and the fund, the provision which limits the fund to the wife and children in case of the bankruptcy of the husband would be invalid. Now it appears to me, that although the partners have not in express terms declared this to have been the object and purpose of the settlement, yet they have by implication or incidentally made by the deed an agreement to this effect. An estimate seems to be made of the value of the fortune to be advanced for the wife, with reference to the current price of the stocks at the date of the deed; upon which calculation, taking the three per cents. at the price of the day, her fortune would have amounted to £. It must have been with this view that the particular provision was made, in case of the failure of

(a) *Ante*, p. 480.

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such issue of the marriage, and upon the bankruptcy of the husband, that fifteen sixty-sixth parts of the trust fund should go to the next of kin of the wife. Although in this case the parties have not precisely expressed this to be their intention and agreement, a Court of Equity has power to look at the substance of the agreement. That this was the substance of the agreement is completely made out by the mode of the proceeding in framing the provisions of the settlement.

In *Higginson v. Kelly*, Lord *Manners* thought himself at liberty to amend a settlement according to the intention of the parties, although it was by deed executed.

I do not propose to amend this settlement, but so to construe it as not to make a distinction unwarranted by the substance of the case; but to treat it as if 5,000*l.*, the fortune of the wife, had been invested in the purchase of such portion of the trust fund of stock as might have been purchased with that sum at the date of the deed of settlement. If the price of three per cents. reduced bank annuities had been then 75*l.*, the stock purchased would have amounted to *l.* I shall therefore declare, that the limitation upon the event of bankruptcy as to fifteen sixty-sixth parts of the fund is valid, and as to the residue void. The accumulations will come under the same principle.

Declaration and order accordingly.

1 to m. t & B 416
1 to m. t & B 418. 711
1 to m. t & B 419
1 to m. t & B 420

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CASES IN BANKRUPTCY.

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The Court of Review will not hear the petition of a bankrupt to supersede a fiat until he has surrendered, notwithstanding the petition is presented before the forty-second day, and the petition comes on before the time for surrendering has expired.

Ex parte DRAKE. — In the matter of DRAKE.

THIS was a petition by the person against whom the fiat was issued to supersede for want of a trading. The only trading attempted to be established was that of brick-making by the petitioner of and from his own soil.

The petition was presented before the forty-second day on which he was to surrender, and the time for his surrender was enlarged by the Court until the 5th of July, before which day this petition came on to be heard, viz. on the 26th of June.

Mr. *Montagu* for the petitioner.

Mr. *Whitmarsh* and Mr. *Bethell*, for the respondent, objected that the petitioner could not be heard, as the petitioner had not surrendered; and they cited *ex parte Peaker*, 2 Gl. & J. 337, by which it is decided, that the commission cannot be superseded upon the petition of the bankrupt before his surrender, though all the creditors consent.

SIR A. PELL: — Can you, Mr. *Montagu*, after this decision, contend that you are entitled to be heard, when it is the general rule of the Court, that a bankrupt cannot petition to supersede before he has surrendered?

Mr. *Montagu*: — I do so contend, because I am not aware of the existence of any such rule, and because *ex parte Peaker* has not any application to the present case; and, even if it had, it has been over-ruled. The rule is, that where a bankrupt, *after* the expiration of the time for surrender, presents a petition to supersede, he cannot, unless under special circumstances, be heard;

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but he may present a petition to supersede *before* the expiration of the time to surrender, and, indeed, on the very day on which the bankruptcy is found, and without any previous surrender. The principle of this is very clear. A merchant who has been improperly declared a bankrupt is entitled to immediate redress, and cannot be compelled to submit to a commission against which he protests, unless he does some act or neglects to do some act to prevent the Court interposing on his behalf. It is every day's practice for a bankrupt to apply immediately the commission issues; and he referred to *ex parte Nicholls*, 2 Gl. & J. 101, which was a petition, to supersede for want of a petitioning creditor's debt, presented before the time for surrender. One meeting only had been held under the commission, where the Vice-Chancellor said, "the bankrupt is not bound to surrender till the last public meeting, the objection therefore must not prevent the commission being superseded, at the costs of the petitioning creditor."

With respect to such petitions, after the expiration of the time for surrender, the rule is not as has been stated on the other side. In *ex parte Wood*, 1 Atk. 222, the Lord Chancellor superseded the commission; and it is stated in the case that he had done so in more instances than one, to prevent a prosecution for felony, where the bankrupt had inadvertently omitted to surrender. In *ex parte Lavender*, 1 Rose, 55, Lord Eldon superseded a commission to prevent proceedings in a prosecution for felony. In *ex parte Carling*, 2 Gl. & J. 35, upon a petition to supersede with the consent of all the creditors, presented after the time for surrender, and without any surrender, Lord Eldon said, "As a commission is merely a civil process, I see no reason for refusing the present application;" and he ordered the commission to be superseded. In *ex parte Peaker*,

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which was a petition after the time for surrender, Lord *Lyndhurst*, recognizing the doctrine that under special circumstances, as in *ex parte Carling*, the commission may be superseded, says, “I do not think that the circumstances of the present case warrant me in making an exception to the rule, that a bankrupt must surrender before he can petition to supersede;” and he thus concludes his judgment, “This rule has been long acted upon; and though there may in many cases appear to be no imperative reason for enforcing it, yet the departure from a settled rule is too frequently attended with evil to allow me hastily to deviate from the practice of my predecessors. The question may, for the regulation of such proceedings in future, be deserving of consideration; but I cannot supersede the present commission until the bankrupt has surrendered.” Upon reflection, Lord *Lyndhurst* did alter the opinion which he had formed, and concurred with Lord *Eldon*.

Mr. *Montagu* cited *ex parte Glynn*, 1 *Mont.* 124, which is as follows: “Mr. *Wakefield* applied to supersede, on consent of creditors, which, as the bankrupt had not surrendered, was refused in the office. He said there had been some doubt with respect to the practice on this subject, and the Lord Chancellor had once thought, that in such case a supersedeas ought not to issue before surrender, *ex parte Peaker*, 2 *Gl. & J.* 337; but after deliberation the order was made.” Mr. *Montagu* also referred to *ex parte Norcutt*, 1 *Mont.* 181.

SIR G. ROSE: — Was there not a case, in the matter of *Coles* and *Galpin*, in which this question arose? I have always understood the rule to be, that, after the expiration of the time to surrender the bankrupt cannot petition until he has surrendered, because he is in contempt; but

to this, as to every general rule, there may be exceptions. With respect to such petitions before the expiration of the time to surrender it has been held that there is not any such rule: That there is no contempt, *ex parte Nicholls*, 2 G. & J. 101. But it is questionable if that case be law.

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Mr. *Montagu*:—The case of *Coles* and *Galpin* is in 1 *Mont.* 207; it was not a petition to supersede upon the consent of creditors. The Vice-Chancellor said he could not supersede previous to surrender, which is merely in confirmation of the rule, that in general, *after* the expiration of the time for surrender, the bankrupt must surrender before he can petition. From these cases it appears, that there is not any such general rule as is stated on the other side; and even to the extent to which the rule is established considerable doubt may be entertained as to the principle on which it is founded. These reasons are stated in *ex parte Jones*, 8 *Ves.* 328, in which Lord *Eldon* says, “He has committed a felony which cannot be got rid of in this manner.” This reason, supposing it to be satisfactory, does not apply to a petition presented to supersede *before* the time for surrender. But, when it is remembered that the non-surrender may have been occasioned by illness, by inadvertence, and by various other causes upon which the Lord Chancellor is entrusted with jurisdiction to decide, how can it be said that the non-surrender is a felony? In *ex parte Jones*, 11 *Ves.* 409, Lord *Eldon* says, “If the bankrupt is not to surrender until he has sifted to the bottom the trading, the act of bankruptcy, and the petitioning creditor’s debt, when these particulars afterwards come to be proved before the commissioners many persons against whom commissions of bankruptcy issue will disprove every thing.” But why, it may be asked, ought

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not a person against whom a commission has issued, and who by *ex parte* evidence in a private room is declared a bankrupt, be entitled, after he has sifted every thing to the bottom, to be permitted to show that the declaration was illegal and unjust?

Mr. *Whitmarsh* and Mr. *Bethell* said the case of *ex parte Glynn*, 1 *Mont.* 124, is only a short note, and does not seem to have been argued; and *ex parte Norcott*, 1 *Mont.* 281, did not apply, as the bankrupt had surrendered at a previous meeting.

Mr. *Montagu*: — *Ex parte Glynn* was mentioned in open court, and with the public statement of the alteration by Lord *Lyndhurst* of his opinion; and the non-surrender in *ex parte Norcott*, although there had been a previous surrender, did not exempt the bankrupt from the felony for neglecting to surrender on the forty-second day.

ERSKINE, C. J.: — The only case exciting any doubt in my mind was *ex parte Nicholls*, 2 *G. & J.* 101. There the petition was presented within the forty-two days, as it was in the case now before the Court. But in *ex parte Nicholls* justice required that the general rule should be relaxed, on the ground that it was absurd and impossible to surrender to a commission clearly illegal on the face of the proceedings themselves. (a) But that case does not establish a general principle, that the bankrupt may petition to supersede before the forty-two days have expired, without surrender; such a rule would open the door to all the mischiefs pointed out in *ex parte Jones*.

(a) The following is the case of *ex parte Nicholls*: — A commission issued against the petitioner; the petitioning creditor's debt consisted of the balance of a bill of costs, reduced by taxation to 96*l.* 11*s.* 10*d.* The petition was by the bankrupt for a supersedeas. Mr. *Pigott*, against the peti-

The general rule is, that the bankrupt must surrender before he can petition to supersede: there is nothing in this case to induce the Court to relax that rule.

PELL, Justice:—The safe and prudent course is what Lord *Lyndhurst* calls the general rule, as laid down in *ex parte Peaker*, where he says, “I do not think that the circumstances of the present case warrant me in making an exception to the rule, that a bankrupt must surrender before he can petition to supersede, even with consent of creditors. This is an adverse application: the creditors do not consent. With regard to the case of *ex parte Nicholls* it is enough to observe, that *ex parte Peaker* is the later case. *Ex parte Glynn* was not subjected to discussion, but even if it had it would not meet the present case, as there the creditors consented. *Ex parte Norcott* was decided under very peculiar circumstances. The certificate of the commissioners shows, that the bankrupt had surrendered in one stage of the proceedings, though he had not done so on the forty-second day. None of these cases break in upon the general principle, that the bankrupt cannot petition to supersede till after surrender.

Petition to stand over.

tion, produced evidence the bankrupt had not surrendered, and objected his petition could not be heard, and cited *ex parte Wilkinson*, 1 G. & J. 387.

Against this objection it was urged, that one meeting only had been held under the commission; that after the reduction of the petitioning creditor's debt the proceedings had been suspended, and he had therefore no opportunity of surrendering, even were

a surrender to a commission, palpably illegal, necessary.

The VICE-CHANCELLOR:—The bankrupt is not bound to surrender till the last meeting; the objection therefore must not prevent the commission being suspended at the costs of the petitioning creditor.

Q. the difference between the present case, where there was no act of bankruptcy, and *ex parte Nicholls*.

1832.

Ex parte
DRAKE.

In the matter
of
DRAKE.

V. C.
June 25,
1831.

The general order does not authorize the commissioners to order a sale of an estate on which an annuity is charged, for payment of the value of the annuity.

See D & D 541.

In the matter of DELVES.

THE commissioners had made an order, under the general order of 1797, for sale of property on which an annuity was secured by way of rent charge. This was a petition to reverse that order.

Mr. *Knight* for the petitioner : —

The words of the order are : “ And I do further order, that upon application to the major part of the commissioners named in any commission of bankrupt, by any person or persons claiming to be a mortgagee or mortgagees of any part of the bankrupt’s estate and effects, the said commissioners shall proceed to inquire whether such person or persons is or are a mortgagee or mortgagees of any part of the bankrupt’s estate or effects, and for what consideration and under what circumstances,” &c. This order has always been construed strictly; it has been held not to extend to equitable mortgages, nor to the case of an estate assigned to secure the payment of mortgage money; and hitherto, in all cases of annuities, the creditor has, as in the case of an equitable mortgage, applied by petition to the Court. (a)

Mr. *Pepys* and Mr. *Jacob*, *contra* : —

By section 54 of the 6 Geo. 4. c. 16. it is enacted, “ that any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascer-

(a) *Ex parte Slack*, 1 Gl. & J. 346; *ex parte Key*, 1 Mad. 426.

tain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission."

1831.
—
In the matter
of
DELVES.

The question is, whether this section, which gives the annuitant a right to have his annuity valued, also gives him a right to have the estate sold upon which the annuity is charged? By the terms of the clause, the duties as to proof on annuities are vested in the commissioners, and the constant practice has been for commissioners to order the sale of property by which the annuity is secured: a practice which avoids the unnecessary expence of an order upon a petition, of which complaints have so frequently and properly been made in the case of equitable mortgages. The cases to which reference has been made prove only, that, until the law is settled, a petition must be presented. It has now, by these very cases, been settled; and none of them decide that a petition is necessary, but merely that a security for the payment of an annuity, like any other security, must be sold, and the creditor's proof confined to the residue.

There can be no doubt that, generally speaking, in cases where the security is merely equitable, the commissioners have no power to act without the order of this Court; but they have where the security is legal, as in this case.

The expression in the act, "every such creditor," shows that it was intended to extend to cases like the present, as well as to mortgages; and the next clause, which enacts that it shall not be lawful to sue collateral sureties till the annuitant has proved, proves that the legislature intended to convert the annuity into a gross sum, not only between the annuitant and the bankrupt, but also between the annuitant and the collateral security.

1831.
 —
 In the matter
 of
 DELVES.

In short, a charge is given upon the estate for the gross sum, which is *quasi* a mortgage.

In *ex parte Fisher* (a) and *ex parte Colvil* (b) the commissioners ordered a sale, and no doubt was entertained by the Court of the propriety of the order.

Mr. *Knight*, in reply, was stopped by the Court.

The VICE-CHANCELLOR: — I think the commissioners have not any authority to make such an order, but that it must be an order on petition.

The prayer of this petition must therefore be granted.

L. C.
 August 24,
 1831.

Ex parte VENABLES.

Quære, whether
 a creditor on a
 voluntary bond
 is entitled to
 vote in the
 choice of as-
 signees?

THE petition stated, that the bankrupt, *Alfred Miller*, executed a voluntary bond to his mother for 1,000*l.*, that the commissioners had admitted the proof, by virtue of which the creditor elected the assignees. It prayed, that the debt might be expunged, or postponed, and that there might be a new choice.

Mr. *Pepys* and Mr. *Montagu*, for the petitioner, cited *the Assignees of Gardner v. Shannon* (c) and *ex parte Hall*. (d)

Mr. *Rose* and Mr. *Jacob*, for the assignee, sought to be removed, contended that, even if the bond were voluntary, yet that nevertheless the obligee was to all intents and purposes a creditor under the commission.

Mr. *Knight* and Mr. *Swanston*, for the creditor, followed the same line of argument, but further insisted, and read affidavits to shew, that the bond was not voluntary, but for full consideration.

(a) 2 *Gl. & J.* 103.

(b) 1 *Mont.* 110.

(c) 2 *Sch. & Lef.* 228.

(d) 1 *Rose.* 30.

The LORD CHANCELLOR was satisfied upon the affidavits, that the bond was for a valuable consideration, and dismissed the petition with costs; and his Lordship added, that even if the bond had been voluntary, such creditor had every right except that of a dividend, which was payable only out of the surplus after the creditors for valuable consideration were paid. (a)

1831.

Ex parte
VENABLES.

Ex parte SOLARTE.— In the matter of ALZEDO.

C. of R.
March 8,
1832.

A COMMISSIONER having refused to examine a witness, this was an appeal against his decision.

Rule as to examination of the executor of a creditor before the commissioners.

The facts were, the assignees of the bankrupt summoned the executrix of a debtor of the bankrupt. The assignees had commenced an action against the executrix for the debt, and she had pleaded *plene administravit*; and to ascertain the truth of that plea, as it seemed, the administratrix was summoned, and the assignees wished to examine her as to the amount, &c. of assets left by the testator. The commissioner refused to examine the executrix on these points. The petition prayed a reference back to the commissioner, or a subdivision court, to examine as to assets, &c.

Mr. *Richards* for the petitioners:—

By the 33d section of 6 Geo. 4, c. 16, the commissioners are empowered “to summon before them any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, or any person whom the commissioners believe capable of giving information concerning the person, trade, dealings, or estate of such

(a) *Ex parte Gladdis*, July 17, 1832. The Court of Review held, that a creditor on voluntary bond cannot vote for assignees.

1832.

—
Ex parte
 SOLARTE.
 In the matter
 of
 ALZEDO.

bankrupt, or any information material to the full disclosure of the dealings of the bankrupt." Section 34 enacts, that, upon the appearance of the person so summoned, it shall be lawful for the commissioners to examine every such person upon oath concerning the person, trade, dealings, or estate of such bankrupt. And, lastly, section 35 enacts, that where any person, known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall be summoned, the commissioners may allow his costs, &c.

Under these sections the commissioner has a clear right to examine the executrix: first, because *Keats*, the testator, was indebted to the bankrupt; if alive, he might be summoned and examined; and, as his executrix represents him, she may be compelled to answer: secondly, the executrix can clearly give some account of the "dealings" of the bankrupt with the testator, and may be examined as a witness to that point: and, thirdly, she has pleaded *plene administravit*. If this should turn out false, she becomes personally liable to the assignees, and in the character of debtor is again liable to be examined. Moreover, the answer of this executrix is likely to be extremely important to the assignees. They brought an action; she pleaded *plene administravit*; they now think of filing a bill for an account, and her reply may determine what course to pursue.

PER CURIAM:—There is no doubt you may examine this witness; the question is, how far? If section 33 stood alone, the commissioners might put any questions whatever; but section 34 restrains them to such as relate to the person, the trade, the dealings, or the estate of the bankrupt. The question put here concerned none of these matters; in fact it was a query put to ascertain the truth of her plea of *plene administravit*, and to

supply the place of a bill in chancery. We are therefore of opinion that the commissioner exercised a sound discretion in not allowing the question to be put.

Petition dismissed. Costs out of the estate.

Mr. *Swanston* for the respondent.

1832.

Ex parte
SOLARTE.
In the matter
of
ALZEDO.

Ex parte PALMER. — In the matter of PALMER.

C. of R.
March 22,
1832.

THIS was a petition by a bankrupt to supersede. Mr. *Koe* and Mr. *Bethel*, for the respondents, made a preliminary objection.

Section 17 of
1 & 2 Gul. 4,
c. 56, does not
prevent a bank-
rupt applying
to supersede,
though two
months have
elapsed from
the date of the
fiat.

By 1 & 2 W. 4, c. 56, s. 17, it is enacted, “ that if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the said Court of Review, such petition to be presented within two calendar months from the date of such adjudication if such trader shall be then residing within the United Kingdom, or within three calendar months from the date aforesaid if then residing in any other part of Europe, or within one year from the date aforesaid if then residing elsewhere, or within such other time as the said court shall allow, (not exceeding one year, to be computed from the date aforesaid,) such Court of Review shall proceed to hear and decide on the said petition ; or, at the option of the said bankrupt, and on his finding such security for costs (if the said court shall think fit to require any security) as by the said court shall be approved, shall direct an issue to try any matter of fact affecting the validity of

2 Dec 6 60
1 Mont & B 40

1 Mont & B 523.

1832.

—
Ex parte
 PALMER.
 In the matter
 of
 PALMER.

such adjudication by a jury, to be duly impannelled and sworn for that purpose before the Chief Judge or any one or more of the other Judges of the Court of Bankruptcy; and if the verdict on such issue shall not be set aside, on application made to the said Court of Review, within one month after the said trial, or if the adjudication of the commissioner shall not be set aside by the said Court of Review on the petition aforesaid, such verdict or such adjudication of the said commissioner shall in all cases, as against the said bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of any such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication, any other act, debt, or trading than the act, debt, or trading proved at such trial notwithstanding: providing always, that an appeal shall be to the Lord Chancellor from the decision of the said Court of Review, upon matter of law or equity, or on the refusal or admission of evidence only."

In this case the commission issued on the 19th of November 1831; the adjudication was on the 20th; but this petition was not answered till the 24th of February 1832, consequently more than two months had elapsed between the adjudication and the presenting the petition.

[PER CURIAM:— Then the two months expired rather more than one week before this Court began to sit. Does not the act apply to bankruptcies declared after the court began its sittings? The act says, if any trader shall be minded to dispute the adjudication, and shall present a petition praying the reversal thereof to the

said Court of Review. This points out a court to which to present the petition ; but no such court was in existence till the 11th of January 1832.]

Mr. Koe :—Section 2 of 1 & 2 W. 4. gives to the Court of Review authority to hear and determine, order and allow, all such matters in bankruptcy as now usually are or lawfully may be brought by petition or otherwise before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy or elsewhere, except as is therein otherwise provided. Then, by section 17, the power of the bankrupt to petition for supersedeas is limited to two months. The words of section 17 clearly are retrospective ; its words being, “if any trader *adjudged*,” not “who *shall be* adjudged,” and intended to limit the right of the bankrupt to present a petition for supersedeas at an indefinite period.

ERSKINE, C. J. :— This preliminary objection is not valid. There are no words in the act to restrain the very general ones of section 2. The object of section 17 was not to limit the jurisdiction of the Court, but to give a new privilege to the bankrupt. Before the 1 & 2 W. 4, c. 56, the bankrupt, after he had surrendered, might petition the Lord Chancellor to supersede ; but that act gives a power to petition immediately, and does not interfere with, or limit the general jurisdiction of this Court to supersede.

PELL, J. :— This is by far the most important clause in the act. The question which now arises upon its construction is, whether a petition not presented till two calendar months after adjudication is too late ? To establish this proposition, it must be proved that the legislature contemplated cases where the time might elapse within one day of the commencement of the act :

1832.

—
Ex parte
PALMER.
In the matter
of
PALMER.

1832.
 —
Ex parte
 PALMER.
 In the matter
 of
 PALMER.

that cannot be the construction. The act clearly intends two full calendar months at any time *during* which the bankrupt may present his petition. A subsequent clause of the act (the 61st) makes this more clear, as that section expressly states what is to be included before the act came into operation.

Cross, J. : — Section 17 only relates to petitions presented to *reverse* the adjudication ; this is a petition to *supersede* a commission, and on that ground, independently of others, this petition does not come under that section.

Rose, J. : — This clause is introductive of a benefit to the bankrupt only. Its words being, *if any trader adjudged bankrupt* shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof. A technical objection has been started as to the word *reversal* in this clause. I think it probable that the drawer of this act intended to leave the *supersedeas* to the Lord Chancellor only ; it being enacted by section 19, that it shall be lawful for the Lord Chancellor, *upon the reversal of any adjudication of bankruptcy*, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this act shall be rescinded or annulled ; and such order shall have all the force and effect of a writ of supersedeas of a commission, according to the existing laws and practice in bankruptcy. The preamble of 1 & 2 W. 4. recites, that it is expedient to provide means of administering and distributing the estate and effects of bankrupts, and of determining the questions which arise touching the same, to the end that *the rights, as well of the bankrupts themselves as of their creditors*, may be enforced with as little delay, expence, and uncertainty as possible, &c. All the former

statutes relating to bankrupts were made for the benefit of creditors; but this act refers to the *rights* of the bankrupt; now the 17th is the only section which does relate to the rights of the bankrupt, therefore I am quite clear that section 17, while it gives a new privilege, &c. to the bankrupt, leaves his general rights as they were before.

1832.

Ex parte
PALMER.

In the matter
of
PALMER.

Mr *Montagu* for the respondents.

Objection overruled.

Ex parte NASH. — In the matter of WYATT and THOMPSON.

C. of R.
May 11
& 12,
1832.

BEFORE the commissioner had signed the declaration of the appointment of assignees, but after he had said that assignees were elected, Mr. *Glynn*, of the firm of *Glynn* and Co., bankers, who had proved at a former meeting, entered the room and claimed his right to vote.

A creditor who has proved is entitled to vote in the choice of assignees if he apply before the commissioner has signed the declaration of appointment.

Mr. *Holroyd* adjudged that he was entitled. This was a petition for a new choice, by virtue of 1 & 2 W. 4. c. 56. s. 25. which enacts, that when any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed to such assignees and the survivor of them.

Petition dismissed with costs.

Mr. *Swanston* and Mr. *Wood* for petitioners.

Mr. *Montagu* and Mr. *Jacob* for respondents.

C. of R.
July 2,
1832.

Ex parte STRIGHT and another. — In the matter of EYLES.

A letter to the secretary of an insurance office, in which the writer says, "I am holder of the under-mentioned policies," and inquires what the office would give for them, is sufficient notice of an assignment.

THE bankrupt deposited two life policies with *Worger*, as security for 300*l*. *Worger* sent the following letter to the secretary of the Insurance office.

" Mr. *H. P. Smith*.

" Sir,

" *I am holder of the under-mentioned policies, and shall feel obliged if you will inform me what sum the office will give if they are delivered up to be cancelled with the consent of the parties.*

" No. 79,766, 5 May 1829, 500*l*. *Maria Eyles*.

65,953, 19 February 1822, 500*l*. *J. E. Eyles*.

" Your reply will oblige your obedient servant,

John Worger.

" Ashford, 19 Oct. 1831."

Mr. Commissioner *Fane* found, that upon the authorities of *Ridout v. Loyd*, 1 *Mont*. 103, and *Falkner v. Case*, 1 *Bro. C. C.* 125; *James v. Gibbin*, 9 *Ves.* 407, and the late decision of the Master of the Rolls, that notice of an assignment of a life policy was not necessary; there was no necessity in law for notice; and that in fact notice was given.

This was an appeal from his decision.

Mr. *Moore* and Mr. *Sturgeon* for the assignees.

Mr. *Montagu* and Mr. *Bligh* for the mortgagee.

PER CURIAM: — It is quite clear the letter is sufficient notice. In these cases the slightest circumstance of notice is sufficient, and this is so plain a case that the petition must be dismissed, and the costs paid by the assignees personally.

2 *Mont* & 356

Mont & 673
Dec & 696
Dec 138
Man & 4
70

Priv 263-57

Ex parte CLARKE. — In the matter of
SEWERKROP.

C. of R.
June 29,
1832.

ON a former day this petition was ordered, on the respondents paying the costs of the day, to stand over till this day ; but no order had been drawn up.

Mr. *Hill* and Mr. *Bethell* for the respondents.

Mr. *Swanston*, for the petition, objected to the respondents being heard, as they had not complied with the order for payment of the costs of the day.

Sir *George Rose* said, as the order for the costs of the day has not been drawn up, the objection cannot be taken. The party cannot be considered in contempt till the order is drawn up and served.

Mr. *Swanston*, in support of his objection, stated that it had been the constant practice, before the Lord Chancellor, to make the objection, and for the Court not to permit the party to be heard until he had complied with the condition on which the petition was permitted to stand over ; and the costs of drawing up and serving an order would far exceed the amount of the costs of the day.

The objection was overruled. (a)

If in the Court of Review a petition is ordered to stand over on payment of the costs of the day, the objection to the petition being heard till the costs are paid cannot be made unless the order has been drawn up.

Ex parte ALEXANDER.—In the matter of ELDER.

PETITION for payment of a dividend by a creditor who had received a circular from the official assignee, saying, “ You may receive a dividend upon application at my office.” The official assignee refused to pay the dividend, because an account was pending against the petitioner, in which he might be debited.

The official assignee is only a ministerial officer, and cannot resist payment of a dividend.

(a) See the case of *ex parte Leech*, 2 *Glyn & J.* 78, where it was determined that it was not necessary to draw up an order for costs of the day.

Mr. *Swanston*, for the petitioner, insisted that the official assignee had no authority to resist payment, being merely a ministerial officer. (*a*)

Mr. *Wigram* for the official assignee.

ROSE, J.:— The official assignee has no more right to oppose this petition than any stranger. He is merely a ministerial officer. The act merely gives him the custody of the estate.

CROSS, J.:— I differ with regret. As the inquiry was not concluded, the official assignee was correct in postponing the payment. In my opinion, the official assignee is to all intents and purposes (save that he cannot appoint solicitor or appoint sales) in the same situation as other assignees. I think there is no ground for the petition. Therefore I decide that the official assignee acted properly, and the petitioner had no right to the dividend till the inquiry was concluded.

PELL, J.:— The official assignee was bound to pay the dividend. By the 25th of our orders each official assignee shall follow the instructions of the commissioner under whom he acts, according to the exigencies of each particular case, subject to such directions as shall from time to time be prescribed by the Court of Review. The official assignee ought, therefore, to have consulted the commissioner, and not to have acted upon his own authority.

ERSKINE, C. J.:— I concur in thinking that the official assignee should investigate, and that, after investigation, he should, instead of acting upon his own authority, have consulted the commissioner.

The dividend was ordered to be paid. Costs reserved to wait the result of an inquiry directed.

(*a*) See sect. 22 of 1 & 2 W. 4. c. 56.

Ex parte B. MORRIS.—In the matter of B. MORRIS and two others.

PETITION by certificated bankrupt for his allowance of $7\frac{1}{2}$ per cent., 12s. 6d. having been paid both on the joint and on his separate estate.

A partner is entitled to an allowance, although his separate estate does not contribute to the joint estate so as to form the statutable amount for allowance.

Mr. *Wakefield*, for the assignees, said : —

Although both the joint and the separate estate respectively had paid more than 12s. 6d., yet the joint estate would not have yielded more than 9s. 8d., but for a surplus brought from the separate estates of the other two bankrupts, there not being any surplus from the estate of the petitioner. One of the other two, though clearly entitled to an allowance, was dead without having obtained it. If a bankrupt, circumstanced like this petitioner, could obtain this allowance, they who had contributed nothing might diminish the funds that might ultimately accrue to another partner who had contributed the whole.

Montre 52
4 Dec. 1823

Mr. *Twiss*, for the petitioner : —

By section 129, in all joint commissions under which any partner shall have obtained his certificate he is entitled to an allowance, and each bankrupt is entitled to a separate allowance. *Ex parte Gibbs*, 1 *Mont.* 109. This question is merely between the creditors and the bankrupts, and not between the bankrupts *inter se*.

PER CURIAM : — Each bankrupt is entitled to his allowance, provided there is a sufficient dividend on both estates, without regard to the estate from which the funds are supplied.

Ordered accordingly.

PRACTICE.

GENERAL.

March 27,
1832.

Examination
of witnesses.

Ex parte TIMBRELL. — In the matter of
STODDART.

ON a *viva voce* examination of a witness, if two assignees, not in adverse interest, appear by different counsel, only one counsel can examine the witness.

Mr. Montagu for the petition.

Mr. Matthews and *Mr. Miller* for the respondents,
the assignees.

Jan. 27,
1832.

Surrender.

Ex parte DODDS. — In the matter of DODDS.

WHERE the bankrupt was abroad when his commission issued, the time for his surrender will be enlarged.

Mr. Rogers for the petition.

July 5,
1832.

Delivery up of
property.

Ex parte EDEN. — In the matter of JACKSON.

THIS was a petition by the Keeper of the Records in the office of the Lord Privy Seal, that certain papers might be delivered up to him, to be placed among the records of the office to which they belonged. *Jackson*, the bankrupt, was formerly Keeper of the Records, had been discharged, and now had the papers in his possession. It was stated that the assignees did not oppose the application, but merely wished the order of the

PRACTICE.

GENERAL.

Court for their protection. No counsel, however, appeared on their behalf.

Mr. *Montagu* suggested, as *amicus curiæ*, that the assignees ought distinctly to repudiate the right to the papers, and then that the bankrupt must be served, as the right to the property would be in him.

The order was however made. (*a*)

Mr. *Kindersley* made the application.

In the matter of J. RICARD.

May 4,
1832.

THIS was a common petition to supersede, with consent of all the creditors; but there was a mistake in the title of the petition, and in the usual certificate, both being addressed to the Lord Chancellor. The creditors signed the certificate in March and April last.

Supersedeas.

Mr. *Whitmarsh* applied to amend the petition and certificate.

The COURT made the usual order, that the certificate might be amended, and received in its amended form, if the Lord Chancellor should think fit.

(*a*) See *ex parte Rowton*, 17 Ves. 432; S. C. 1 Rose, 15.

PRACTICE.

GENERAL.

May 26,
1832.
Certificate.

In the matter of JOHN REYNOLDS.

MR. SWANSTON:— The certificate is signed by the only two creditors, but the *date* of their signature was written for them at the time by another person. The order requires the creditors to affix the date *themselves*; therefore the officer refused to pass the certificate. *Ex parte Laing*, 1 Gl. & J. 348, shows that the certificate may pass.

Per CURIAM:— As there is no reason to doubt the honesty of the transaction, and as the direction is not statutory, but merely by an order, the certificate may pass.

CERTIFICATE.

June 4 & 5,
1832.
Certificate.

In the matter of HALL.

A BANKRUPT'S certificate being before the Chancellor, three mortgagees obtained an order from the Vice-Chancellor to stay it till they could prove; but they had been since duly satisfied their debts. This was a petition to allow the certificate, notwithstanding the order of the Vice-Chancellor; which was ordered.

Mr. Swanston for the petitioner.

Mr. Montagu, for the creditors, consenting.

PRACTICE.

DOCKET, ISSUING FIAT, &c.

In the matter of JOHN WOOD.

May 4,
1832.

THIS was a petition to dispense with the personal attendance of the petitioning creditor at the opening the fiat. He was seventy-seven years of age, resided 154 miles from the place where the fiat was to be worked, and could not go but at risk of his life. The petition also prayed, that the signature to the petition by his son might be sufficient. The son made the affidavit in support.

Petitioning
creditor.

PER CURIAM:—As he is ill let the order be as prayed. The signature may be altogether dispensed with.

Ex parte GREYBOURNE.

April 25,
1832.

MR. PARKER applied that docket papers might be received. The bond and affidavit were both on the same sheet of paper; the bond duly set out the bankrupt's description, but the affidavit merely mentioned his *name*. The office had refused these docket papers as irregular.

Docket,
Amending.

THE COURT ordered that they might be received, if the Lord Chancellor should think fit.

PRACTICE.

DOCKET, ISSUING FIAT, &c.

Jan. 18,
1832.

Docket.

Ex parte LECHMERE.—In the matter of
STEWART.

DOCKET papers sent up from the country after the 12th of January contained the word “commission” instead of the word “fiat,” according to the new act and orders; and, upon the objection of the secretary of bankrupts, the papers were sent back to the country to be amended. In the meantime a London solicitor struck a docket, and applied for a fiat. Upon motion it was ordered, under the peculiar circumstances of the case, and the new jurisdiction, that the fiat should issue to the first applicant, notwithstanding the mistake of the word; and costs out of the estate were refused to the second applicant.

To show that the first regular docket should be preferred, Mr. *Montagu* cited *ex parte Stocker*, 1 G. & J. 249; *ex parte Hardman*, 1 J. & W. 294, and the order 29th December 1806.

Mr. *Romilly* for the petitioner.

Mr. *Montagu* for the respondent.

April 25,
1832.
Amending fiat.

In the matter of WALKER.

MR. MONTAGU applied for leave to strike a new docket, and amend the fiat already issued, by substituting the name of *Thomas Walker* for *John Walker*. The fiat had not been opened, nor any proceedings had under it.

PRACTICE.

DOCKET, ISSUING FIAT, &c.

PER CURIAM: — Has the fiat been filed? If so, the order can only extend to take it off the file of this Court, in order that the Lord Chancellor may, if he think proper, amend it. This Court has no power to amend a fiat; there is nothing for us to amend by.

The order made was: Let the fiat be taken off the file of the Court, with liberty to amend it on new docket papers, if the Lord Chancellor think fit.

In the matter of NORTH.

June 5,
1832.

THIS was a petition by the petitioning creditor to enlarge the time for opening a fiat, there being great probability of a composition. The bankrupt had not been served. Enlarging
time to open.

Mr. *Montagu*, in support of the prayer, cited *ex parte Dawton*, 1 *Dea. & Ch.* 111.

Order refused, on the ground that such an application could not be entertained when made by the petitioning creditor.

Mr. *Montagu* renewed the application, on the petition of the bankrupt, the petitioning creditor consenting. June 13.

PER CURIAM: — Enlarge the time for fourteen days. But let it be understood, that such cases depend each on its own peculiar circumstances.

CASES IN BANKRUPTCY.

PRACTICE.

DOCKET, ISSUING FIAT, &c.

Jan. 23,
1832.
Opening fiat.

In the matter of MATTHEWS.

THE time for opening a fiat having expired, by the contrivance of the bankrupt in keeping a witness out of the way, an application was made, on the petition of the petitioning creditor, that he might strike a new docket.

The petition was answered *instantly*, and the order was made, without prejudice to the rights of other parties.

Mr. *Montagu* for the petitioner.

Jan. 23,
1832.
Opening fiat.

Ex parte MOODY.

UPON a petition to enlarge for a week the time for opening a joint fiat, the petitioning creditor, on account of the absence of a witness, not being prepared to prove an act of bankruptcy against one of the partners, the order was made, with an intimation from the Court that such applications would not be encouraged, as the petitioning creditor ought to be prepared.

Mr. *Montagu* for the petitioner.

 JURISDICTION.

Jan. 14,
1832.
Jurisdiction.

In the matter of APPLING.

IN this case it was held, that the Court of Review had no jurisdiction to hear a petition addressed to the Lord Chancellor; but, on the 18th of January, a general order was made to enable parties to transfer to the Court of Review petitions addressed to the Lord Chancellor.

Mr. *Montagu* for the petitioner.

PRACTICE.

JURISDICTION.

Ex parte JENKINS. — In the matter of NOKES.

Feb. 16,
1832.

THIS was an appeal from the Vice-Chancellor, heard here by consent; but the order appealed against had not been drawn up.

Appeals.

PER CURIAM:— This petition cannot be entertained: it purports to be an appeal against an order which we cannot judicially recognize till formally drawn up.

Mr. *Montagu* and Mr. *Anderdon* for the petitioners.

Mr. *Swanston* for the respondents.

In the matter of WHITFIELD.

May 12,
1832.

MR. *BACON* applied for an order on the Lord Chancellor's secretary of bankrupts to attend at Guildhall, to produce certain documents on a trial there.

Production of
papers by
secretary of
bankrupts.

PER CURIAM:— He may have *leave* from us, but we cannot *order* him. Take an order giving *leave*.

Ex parte FERRERS. — In the matter of HARD-
WICKE.

June 19,
1832.

A PETITION before the Vice-Chancellor had been dismissed with costs; the Vice-Chancellor had issued the usual order for payment of the costs.

Mode of en-
forcing orders
of V. C.

2 Dec 1832

Mr. *Russell* now applied for the four day order.

PER CURIAM:— This Court not having made any order, the respondent is not in contempt here; and we cannot judicially recognize the order of the Vice-Chancellor in this matter. Take the usual seven day order.

PRACTICE.

MORTGAGE.

May 2,
1832.
Equitable
mortgages.

Ex parte SMITH. — In the matter of HARRISON.

PER CURIAM: — In cases of equitable mortgages the Court will themselves decide the question, whether equitable mortgage or not, if practicable, instead of sending to the commissioners; a practice which crept into Courts of Equity through the pressure of business, and was not the original practice.

Mr. *E. Chitty* for the petitioner.

Mr. *Flather* for the assignees.

June 16,
1832.
Equitable
mortgage.

Ex parte WILLIAMS. — In the matter of HALL.

A SALE of an equitable mortgage had been ordered on a former day.

Mr. *Turner* now applied for leave for the mortgagee to bid.

Mr. *Montagu*, for the assignees, consented, except that he was not instructed to consent as to costs.

ERSKINE, C. J.: — The rule of practice is, that if the assignees consent, costs may be paid out of the estate; if they do not, the petitioner must pay them.

PRACTICE.

MORTGAGE.

— 1 Dec 27 1832.

Ex parte ROLFE. — In the matter of JOHNSON.

Jan. 27,
1832.

IN this case the common order was made for the sale of mortgaged premises, with leave to bid, and costs out of the proceeds. But the same solicitor being concerned for the assignees and the mortgagee, who was one of them, it was ordered that another solicitor should be appointed to conduct the sale. Equitable mortgage.

Mr. *Swanston* for the petitioners.

PETITION.

Ex parte FLIGHT. — In the matter of BATEMAN.

Jan. 27,
1832.

A PETITION to supersede a commission, stating only that the bankrupt *at the date of the commission* was indebted to the petitioner, is defective. It should also be alleged, that he is a creditor at the time of presenting the petition, as his debt may have been satisfied since the issuing of the commission. See Anon. 2 *Mad.* 281. Form of petition to supersede.

Mr. *Wakefield* for the petitioners.

Mr. *Koe* for the respondent.

PRACTICE.

PETITION.

June 19,
1832.

Attestation.

Ex parte WIGGINS.

THE following was the attestation: "Witness, *B. Stanley*, New Bridge Street, petitioner's solicitor."

Mr. *Swanston* objected this was bad.

ERSKINE, C. J.: — We now order that it may be amended, and then the petition stands as amended, and may be proceeded with.

Rose, J.: — We shall always endeavour to get over such objections.

Mr. *Montagu* for the petitioner. (a)

March 8,
1832.

Attestation.

Ex parte VINES. — In the matter of HOOPER.

IF the parties to a petition are very numerous, the Court will order it to be heard, if signed by one of the parties only, and attested by his solicitor, as this answers the spirit of the order, by providing a responsible person.

Mr. *Bacon* made the application.

(a) See cases cited, 1 *Mont. & Gregg*. Dig. 294; *ex parte Cracklow*, 1 *Mont.* 355.

PRACTICE.

PETITION.

ANONYMOUS.

March 26,
1832.

MR. MONTAGU moved that a petition by several might be answered on the signature of one of the petitioners, the solicitor undertaking to obtain the signatures of the others before the hearing.

Signature to
petition.

PER CURIAM:—In pressing cases the Lord Chancellor allowed petitions to be answered without *any* signature. Take an order altogether dispensing with the signatures of the other petitioners.

Ex parte WHITE.—In the matter of
SCRIVENER.

Jan. 24,
1832.

A PARTY having been arrested for the costs of a petition to supersede a commission which was dismissed, but the petition was afterwards superseded upon a renewed application, an order to discharge him cannot be made without notice to an attorney to the petitioning creditor who claimed a lien upon the costs, even if the client consents.

Service of
petition.

Mr. Montagu made the motion.

Ex parte GRIFFITH.—In the matter of COOPER.

Jan. 25,
1832.

AN order to tax a solicitor's bill is not of course, but the petition must be served upon the solicitor.

Service of
petition.

Mr. Montagu for the petitioner.

PRACTICE.

PETITION.

June 4,
1832.

Amending
petition.

Ex parte GREEN. — In the matter of RIDLEY.

MR. MONTAGU, on a petition for a procedendo, applied to amend the petition by inserting a prayer for costs.

Mr. Kindersley, for one of the respondents, a purchaser : —

The petition is actually in the paper to be heard to-day, and this application cannot be entertained. Moreover, we have filed our affidavits, and, if costs had been prayed in the petition against us, might have made more opposition than we have.

PER CURIAM : — Take an order to amend ; but if any costs will be incurred by the amendment, the petitioner must pay them ; but the costs of opposing this motion must be paid by Mr. Kindersley's client.

May 26,
1832.

Amending
petition.

In the matter of EBDEN.

THIS was a petition to supersede, presented to the Lord Chancellor before this Court was established ; it had not been heard.

Mr. Koe now applied for leave to alter the title of the petition to that used in this Court.

ERSKINE, C. J. — You may file a supplemental petition, referring to that before the Lord Chancellor, and praying that the prayer of the former petition may be granted by this Court.

Mr. Koe : — That course would be expensive.

ROSE, J. : — Then serve the assignees with notice of motion, that the prayer of the petition presented to the Lord Chancellor may be granted by this Court.

PRACTICE.

PETITION.

Ex parte FRY. — In the matter of STINCHCOMBE.

June 14,
1832.

THIS case had stood over to have witnesses examined *vivâ voce*.

Affidavits.

Mr. *Montagu* now tendered an affidavit filed since the case so stood over.

Mr. *Ellison* objected to its being read.

PER CURIAM: — As the respondents object, the affidavit cannot be read. Where a case stands over, the Court, for its own information, sometimes orders affidavits to be filed as to particular facts, or even gives leave to do so, on the application of the parties. But the general rule is, that when a case stands over to examine particular witnesses, fresh affidavits cannot be filed, unless by order of the Court, or the consent of the other side.

Ex parte LAWLEY. — In the matter of SAWYER.

May 26,
1832.

ON a petition to supersede, on the ground of no act of bankruptcy, an affidavit made by the petitioning creditor (who was also an assignee), in support of the commission, was objected to, but the objection over-ruled.

Affidavits.

Mr. *Montagu* and Mr. *Flather* for the petitioner.

Mr. *Twiss* and Mr. *Bethell* for the respondents.

PRACTICE.

PETITION.

Feb. 29,
1832.
Affidavits.

Ex parte MEATH. — In the Matter of PEARSON.

A PETITION was addressed “To his Honour the Chief Judge, and their Honours the rest of the Judges.” It should have been, “To the Right Honourable the Chief Judge, and the other Judges of the Court of Review.” The Court did not think the variance material; but, the petitioner pressing, leave was given to amend. But,

PER CURIAM : — If the title is amended, the affidavits must be re-sworn.

Jan. 23,
1832.
Affidavits.

Ex parte DONALDSON. — In the matter of
WRIGHT.

AFFIDAVITS filed in support of a petition to the Lord Chancellor, which petition has been transferred to the Court of Review, cannot be used without notice.

Mr. *Bichner* made the application.

3 Front 20361
2 Dec 466

APPENDIX.

1 & 2 Gul. IV. Cap. 56.

An Act to establish a Court in Bankruptcy.

[20th October 1831.]

WHEREAS an act was passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled “An act to amend the laws relating to bankrupts;” and 6 G. 4. c. 16. whereas it is expedient to provide means of administering and distributing the estate and effects of bankrupts, and of determining the questions which from time to time arise touching the same, other than are provided by the said act: to the end that the rights, as well of the bankrupts themselves as of their creditors, may be enforced with little expence, delay, and uncertainty as possible, be it enacted, That it shall and may be lawful for his Majesty, his heirs and successors, by charter or letters patent under the great seal of the United Kingdom of Great Britain and Ireland, to Establishment
of a court of
bankruptcy. erect and establish a court of judicature which shall be called “The Court of Bankruptcy,” and by commission under the great seal to appoint one person, being a serjeant or a barrister at law of not less than ten years standing, to be the chief judge of the said court, and three persons, being serjeants or barristers at law of not less than ten years standing at the bar, or of five years standing at the bar, having previously practised five years as a special pleader below the bar, to be other judges of the said court, and six persons, being barristers at law of not less than seven years standing at the bar, or of four years standing at the bar, having previously practised as a special pleader for three years below the bar, to be called commissioners of the said court, and from time to time to supply any vacancy in the number of the said judges and commissioners; and the same court shall be and constitute a court

of law and equity, and shall, together with every judge and commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a court of record or judge of a court of record, and all other rights, incidents, and privileges, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of his Majesty's courts of law or judges at Westminster.

The court of review.

2. That the said judges or any three of them shall and may form a court of review, which shall always sit in public, save and except as may be otherwise directed by this act, or by the rules and regulations to be made in pursuance hereof, and shall have superintendence and controul in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order, and allow all such matters in bankruptcy as now usually are or lawfully may be brought, by petition or otherwise, before the lord chancellor, whether such matters may have arisen in the said court of bankruptcy or elsewhere, except as is herein otherwise provided, and also to investigate, examine, hear, and determine all such other matters within the jurisdiction of the said court of bankruptcy as are by this act, or may be by the said rules and regulations, assigned and referred to the said court of review.

Mode of application to court of review.

3. That all such matters to be heard and determined in the said court of review shall be brought on by way of petition, motion, or special case, according to the rules and regulations to be established as herein-after provided, subject to an appeal to the lord chancellor on matters of law and equity, or on the refusal or admission of evidence only; and in all cases of appeal to the lord chancellor by virtue of this act, such appeal shall be on a special case, and in no other mode whatsoever, except the lord chancellor shall in any case otherwise direct; which special case shall be approved and certified by one of the judges of the said court of review in matters arising in the said court, and by the judge trying the issue in matters arising out of

Mode of appeal to the lord chancellor.

APPENDIX.

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the trial of issues ; and the determination of such judge on the settlement of such case shall be final and conclusive : provided always, that all appeals to the lord chancellor by virtue of this act shall be heard by the lord chancellor only, and not by any other judge of the high court of chancery.

4. That it shall be lawful for the said court of review to direct any issue of fact arising therein to be tried by a jury before one of the judges thereof, or before a judge of assize, and to issue process to compel the attendance of jurors and witnesses, and to enforce the orders and decrees of the said court of review, and to that end to exercise all the powers vested for such purposes in any of his Majesty's courts of record at Westminster.

Court of review
may direct
issues.

5. That all costs of suit between party and party in the said court of review shall be in the discretion of the court, and shall be taxed by one of the masters of the high court of chancery.

Costs in the
court of review.

6. That the said six commissioners may be formed into two subdivision courts, consisting of three commissioners for each court, for hearing and determining the matters and things and making the examinations herein-after referred thereto ; and all references or adjournments by a single commissioner to a subdivision court, by virtue of this act, shall be to the subdivision court to which he belongs, unless the said commissioner, in case of the sickness of some one or more of the commissioners of such subdivision court, or other sufficient cause, shall think fit otherwise to direct ; and the said subdivision courts may sit either in public or private, as they shall see fit, unless where it shall be otherwise provided by this act, or by the rules to be made as herein-after mentioned.

Subdivision
courts.

7. That in every bankruptcy prosecuted in the said court of bankruptcy it shall and may be lawful for any one or

The powers of
commissioners.

more of the said six commissioners to have, perform, and execute all the powers, duties, and authorities by any act or acts of parliament now in force vested in commissioners of bankrupt, in all respects as if they or any one or more of them were in every instance specially authorized and appointed for the purpose by a separate commission under the great seal of the United Kingdom of Great Britain and Ireland; provided always, that no single commissioner shall have power to commit any bankrupt or other person examined before him otherwise than to the care and custody of a messenger or other officer of the said court, to be by him detained in his custody, and brought up before a subdivision court or the court of review within three days after such commitment, for which purpose one of such courts shall be forthwith assembled, and to which court such examination shall be adjourned.

Oath of judges
and commis-
sioners.

8. That in lieu of the oath directed to be taken by commissioners under the said recited act, every judge and commissioner to be appointed by virtue of this act shall, before he shall be capable of acting in the execution of any of the powers and authorities given by this act, take an oath in the presence of the lord chancellor to the effect following; (that is to say,)

‘ I A. B. do swear, that I will faithfully, impartially,
‘ and honestly, according to the best of my skill and
‘ knowledge, execute the several powers and trusts reposed
‘ in me [as the chief judge, *or* one of the judges, *or* one
‘ of the commissioners, *as the case may be*, of the court of
‘ bankruptcy], and that without favour or affection, preju-
‘ dice or malice. So help me GOD.’

And any judge or commissioner, having once taken the said oath, shall not again be required to take the same so long as he shall continue in office.

Appointment
of registrars
and deputy
registrars.

9. That it shall be lawful for his Majesty, his heirs and successors, under his or their royal sign manual, from time

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to time to appoint two registrars, and any number not exceeding eight deputy registrars, to act as such in the said court of bankruptcy, and to attend upon and assist the said judges and commissioners; which officers so to be from time to time appointed shall hold their respective offices during good behaviour, notwithstanding the demise of his Majesty or any of his heirs or successors: provided always, that it shall be lawful for his Majesty, his heirs and successors, to remove any of such officers upon a certificate from the said court of review, or one of the subdivision courts, of some sufficient reason, to be named therein, for such removal.

10. That all attornies and solicitors of any of the superior courts of law or equity at Westminster may be admitted and have their names enrolled in the said court of bankruptcy, without any fee or charge other than such as shall be allowed by this act, or any rule or regulation to be made in pursuance thereof, and may appear and plead in any proceedings in the said court without being required to employ counsel, (except in proceedings before the said court of review, and upon the trial of issues by jury); and in case any person, not being an attorney or solicitor duly admitted as aforesaid, shall practise in the said court of bankruptcy as an attorney or solicitor, he shall be deemed guilty of a contempt of the said court, and be liable to all the penalties incident thereto, on complaint thereof made to the court of review; and that all the laws and statutes now in force concerning attornies and solicitors shall extend to attornies and solicitors practising in the said court of bankruptcy.

All attornies and solicitors may practise in this court.

11. That the judges of the said court of review, with the consent of the lord chancellor, shall have power from time to time to make general rules and orders for regulating the practice of the said court of bankruptcy, the sittings of the judges and commissioners thereof, and the conduct of the other officers and of the practitioners therein.

Judges to make rules for regulating the proceedings of the court.

The lord chancellor to issue a fiat in lieu of a commission.

12. That in every case wherein the lord chancellor, by virtue of any former act, hath power to issue a commission of bankrupt under the great seal, it shall and may be lawful for him, and also for the master of the rolls, the vice-chancellor, and each of the masters of the court of chancery acting under any appointment by the lord chancellor to be given for that purpose, on petition made to the lord chancellor against any trader having committed any act of bankruptcy by any creditor of such trader, and upon his filing such affidavit and giving such bond as is by law required, to issue his fiat under his hand in lieu of such commission, thereby authorizing such creditor to prosecute his said complaint in the said court of bankruptcy, or to prosecute the same elsewhere before such discreet and proper persons as the lord chancellor, or as the master of the rolls, vice-chancellor, or one of the masters of the court of chancery, acting as aforesaid, by such fiat may think fit to nominate and appoint; and that the persons so appointed shall thereby have the like power and authority to all intents and purposes as if they were assigned and appointed special commissioners by virtue of a commission under the great seal.

Fiats to be filed in court of bankruptcy.

13. That every such fiat, prosecuted in the said court of bankruptcy, shall be filed and entered of record in the said court, and shall thenceforth be a record of the said court, and it shall thereupon be lawful for any one or more of the commissioners thereof to proceed thereon in all respects as commissioners acting in the execution of a commission of bankrupt, save and except as such proceeding may be altered by virtue of this act.

Appointment of country commissioners, and fiats to them.

14. That the judges who go the several circuits in England and Wales may be directed by the lord chancellor from time to time to return to him the names of such number as he shall think fit to require of barristers, solicitors, and attornies practising in the counties to the said circuits belonging, and upon such persons being returned, and ap-

proved by the lord chancellor, the fiat or fiats aforesaid not directed to the court of bankruptcy shall be directed to some one or more of such persons in rotation to act as commissioners of bankrupt, according to the districts or places for which such persons shall be so returned, and to no other person than such as shall be included in such return: provided always, that it shall be lawful for the lord chancellor at any time to remove any person from the lists to be so returned for such cause as to him shall seem fit.

15. That in lieu of the oath required by the said recited act to be taken by commissioners of bankrupt, all persons acting as such commissioners elsewhere than in the said court of bankruptcy shall take an oath to the effect following:

Oath of commissioners in the country.

‘ [A.B. do swear, that I will faithfully, impartially, and
 ‘ honestly, according to the best of my skill and know-
 ‘ ledge, execute the several powers and trusts reposed in
 ‘ me as a commissioner in a prosecution of bankruptcy
 ‘ against and that without favour or
 ‘ affection, prejudice or malice. So help me GOD.’

16. And be it enacted, that all the laws and statutes, rules and orders, now in force relating to bankrupts, or to commissioners of bankrupt, or to proceedings under such commissions, or to the subject matters of such proceedings, or to the persons concerned therein or in any way affected thereby, shall in like manner extend and be construed to extend in every respect, as far as the same may be applicable, to this act, and to fiats issued in pursuance thereof, and to all proceedings under the same, and to all the subject matters of such proceedings, and to all persons concerned therein or in any way affected thereby, to all intents and purposes whatsoever, as if every such fiat were a commission of bankrupt under the great seal of the United Kingdom of Great Britain and Ireland, save and except as may be otherwise directed by this act.

Provisions of former acts made applicable to this Act and to fiats.

Manner of proceeding in case the bankrupt shall dispute the adjudication.

17. That if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the said court of review, such petition to be presented within two calendar months from the date of such adjudication if such trader shall be then residing within the United Kingdom, or within three calendar months from the date aforesaid if then residing in any other part of Europe, or within one year from the date aforesaid if then residing elsewhere, or within such other time as the said court shall allow, (not exceeding one year, to be computed from the date aforesaid,) such court of review shall proceed to hear and decide on the said petition; or, at the option of the said bankrupt, and on his finding such security for costs (if the said court shall think fit to require any security) as by the said court shall be approved, shall direct an issue to try any matter of fact affecting the validity of such adjudication by a jury, to be duly impannelled and sworn for that purpose, before the chief judge or any one or more of the other judges of the court of bankruptcy; and if the verdict on such issue shall not be set aside, on application made to the said court of review, within one month after the said trial, or if the adjudication of the commissioner shall not be set aside by the said court of review on the petition aforesaid, such verdict or such adjudication of the said commissioner shall in all cases, as against the said bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of any such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication, any other act, debt, or trading than the act, debt, or trading proved at such trial notwithstanding: provided always, that an appeal shall be to the lord chancellor from the decision of the said court of review, upon matter of law or equity, or on the refusal or admission of evidence only.

18. Provided always, that after any such issue shall have been tried as aforesaid, it shall and may be lawful for the lord chancellor, on petition to him, to be presented within one calendar month after such verdict, and upon notice thereof to the bankrupt, upon special circumstances, to be submitted to the said lord chancellor, to order that another fiat do issue at the instance of any other than the former petitioning creditor against the said bankrupt, and that such fiat shall and may be supported by any debt, trading, or act of bankruptcy other than those given in evidence on the trial of such issue.

Fiat to issue on petition to lord chancellor.

19. That it shall be lawful for the lord chancellor, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this act shall be rescinded or annulled; and such order shall have all the force and effect of a writ of supersedeas of a commission according to the existing laws and practice in bankruptcy.

Power to annul fiat.

20. That it shall be lawful for any commissioner who shall make any adjudication of bankruptcy to appoint two or more public meetings, instead of the three meetings directed by the said recited act, for the bankrupt to surrender and conform, the last of which said meetings shall be on the forty-second day after the publication of his bankruptcy in the Gazette; and the choice of assignees shall take place at the first of such two meetings.

Meetings of creditors.

21. That in all cases in which power is by this act given to any one of the said commissioners to act, such power shall and may in like manner be exercised by the said chief judge, or by any one of the said other judges, as occasion may require; and where any such judge so acting would, in case he were a commissioner, make any reference or adjournment to a subdivision court, such reference or adjournment shall be made by such judge to the court of review instead of to a subdivision court.

Powers given to the commissioners may be exercised by the judges.

Appointment
of official
assignees.

Their duty.

22. That a number of persons not exceeding thirty, being merchants, brokers, or accountants, or persons who are or have been engaged in trade in the cities of London or Westminster or the parts adjacent, shall be chosen by the lord chancellor to act as official assignees in all bankruptcies prosecuted in the said court of bankruptcy; one of which said official assignees shall in all cases be an assignee of each bankrupt's estate and effects, together with the assignee or assignees to be chosen by the creditors; such official assignee to give such security, to be subject to such rules, to be selected for such estate, and to act in such manner as the said chief and other judges, with the consent of the lord chancellor, shall from time to time direct; and all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of sale of all the estate and effects, real and personal, of the bankrupt, shall in every case be possessed and received by such official assignee alone, save where it shall be otherwise directed by the said court of bankruptcy or any judge or commissioner thereof; and all stock in the public funds or of any public company, and all monies, exchequer bills, India bonds, or other public securities, and all bills, notes, and other negotiable instruments, shall be forthwith transferred, delivered, and paid by such official assignee into the bank of England, to the credit of the accountant-general of the high court of chancery, to be subject to such order, rule, and regulation, for the keeping of the account of the said monies and other effects, and for the payment and delivery in, investment, and payment and delivery out of the same, as the lord chancellor, or the said court of review, or any judge of the said court of bankruptcy, if authorized so to do by any general order of the same court, shall direct; and if any such assignee shall neglect to make such transfer, delivery, or payment, every such assignee shall be liable to be charged in the same manner as by the said recited act is provided in cases of neglect by assignees to invest money in the purchase of exchequer bills, when directed so to do: provided always, that until assignees

shall be chosen by the creditors of each bankrupt, such official assignee so to be appointed to act with the assignees to be chosen by the creditors shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a sole assignee of each bankrupt's estates and effects.

23. Provided always, that nothing herein contained shall extend to authorize any such official assignee to interfere with the assignees chosen by the creditors in the appointment or removal of a solicitor or attorney, or in directing the time and manner of effecting any sale of the bankrupt's estates or effects.

Proviso restricting the authority of official assignees.

24. That it shall be lawful for the lord chancellor, from time to time, as any vacancy may occur in the said before-mentioned number of official assignees, to appoint some other such person as aforesaid to fill any vacancy so occurring; and in case of the death or removal of any official assignee who shall have been appointed to act in any bankruptcy, it shall be lawful for the said court of bankruptcy, subject to any rules to be made by virtue of this act, to appoint another official assignee of the number hereby prescribed to act in the same bankruptcy in the place of the assignee who shall have so become dead or been removed.

For filling up vacancies in the number of assignees.

25. That when any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed to such assignees and the survivor of them; and as often as any such assignees shall die, or be lawfully removed, and a new

Personal estate to vest in assignees.

assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee shall by virtue of such appointment vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed of assignment for that purpose.

Real estate how to vest.

26. That where any person shall have been adjudged a bankrupt, all such present and future real estate of such bankrupt, whether in the United Kingdom of Great Britain and Ireland, or in any of the dominions, plantations, or colonies belonging to his Majesty, as by the said recited act is directed to be conveyed by the commissioners to the assignees, shall vest in such bankrupt's assignee or assignees for the time being, by virtue of his or their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall by virtue of such appointment vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose.

In cases where a conveyance of the property of a bankrupt would require to be registered, the certificate of appointment of the assignees shall be registered.

27. Provided always, that where according to any laws now in force any conveyance or assignment of any real or personal property of a bankrupt would require to be registered, enrolled, or recorded in any registry office in England, Wales, or Ireland, or in any registry office, court, or other place in Scotland, or any of the dominions, plantations, or colonies belonging to his Majesty, then, in every such case, such certificate as hereafter is described of the appointment of an assignee or assignees shall be registered in the registry office, court, or place wherein such conveyance or assignment as last aforesaid would require to be registered, enrolled, or recorded; and the registry hereby directed shall have the like effect to all intents and purposes as the registry,

enrolment, or recording of such conveyance or assignment as last aforesaid would have had ; and the title of any purchaser of any such property as last aforesaid, for valuable consideration, without notice of the bankruptcy, who shall have duly registered, enrolled, or recorded his purchase deed previous to the registry hereby directed, shall not be invalidated by reason of such appointment of an assignee or assignees as aforesaid, or the vesting of such property in him or them consequent thereupon, unless the certificate of such appointment shall be registered as aforesaid within the times following ; (that is to say,) as regards the United Kingdom of Great Britain and Ireland, within two months from the date of such appointment ; and as regards all other places, within twelve months from the date thereof.

28. That the said judges of the said court of bankruptcy shall cause to be made a seal of the said court, in such form as they shall think fit, and shall cause to be sealed therewith all such proceedings, documents, and copies as by the law now in being, or by this act, or by any rule or order of the said court, shall be required to be so sealed.

Seal of the
court.

29. That a certificate of the appointment of such assignees, purporting to be under the seal of the said court of bankruptcy, shall be received as evidence of such appointment, in all courts and places whatsoever, without further proof.

Evidence of
appointment of
assignees.

30. That any one of the said six commissioners, if he think fit, may adjourn the examination of any bankrupt or other person to be taken either before a subdivision court or the court of review, and may likewise adjourn the examination of a proof of debt to be heard before a subdivision court ; which said court shall proceed with such last-mentioned examination, and finally, and without any appeal, except upon matter of law or equity, or of the re-

Adjournment
of examinations
to subdivision
courts.

Trial of disputed debts.

refusal or the admission of evidence, shall determine upon such proof of debts: provided always, that in case, before the said commissioner or subdivision court, both parties, the assignees or the major part of them, and the creditor, consent to have the validity of any debt in dispute tried by a jury, an issue shall be prepared under the direction of the said commissioner or subdivision court, and sent for trial before the chief judge or one or more of the other judges; and if one party only applies for such issue, the said commissioner or subdivision court shall decide whether or not such trial shall be had, subject to an appeal as to such decision to the court of review.

Certain decisions of commissioners may be brought under review or appealed against.

31. That if such commissioner or subdivision court shall determine any point of law or matter of equity, or decide on the refusal or admission of evidence in the case of any disputed debt, such matter may be brought under review of the court of review by the party who thinks himself aggrieved, and the proof of the debt shall be suspended until such appeal shall be disposed of, and a sum not exceeding any expected dividend or dividends on the debt in dispute in such proof may be set apart in the hands of the said accountant-general until such decision be made; and in like manner there may be an appeal on the like matter of law or equity from the court of review to the lord chancellor.

Determination of court of review in favour of appeals touching such decisions to be final, unless appealed against within one month.

32. That if the court of review shall determine in any appeal touching any decision in matter of law upon the whole merits of any proof of debt, then the order of the said court shall finally determine the question as to the said proof, unless an appeal to the lord chancellor be lodged within one month from such determination; and in case of such an appeal, the determination of the lord chancellor thereupon shall in like manner be final touching such proof; but if the appeal, either to the court of review or the lord chancellor, shall be allowed in relation to the admission or

refusal of evidence, then and in that case the proof of the debt shall be again heard by the commissioner or subdivision court, and the said evidence shall be then admitted or rejected accordingly.

33. That after any issue by this act authorized shall be tried, a new trial may be moved in the court of review, which new trial shall be granted or refused according to the rules of the common law and the practice of the courts of Westminster in granting or refusing new trials.

New trial of issues.

34. That it shall be lawful for any creditor to make proof of his debt by affidavit, sworn before one of the said judges or commissioners, or before a master in chancery, ordinary or extraordinary, or, if such creditor shall live out of England, by affidavit sworn before a magistrate where such creditor shall be residing, and attested by a notary public, British minister, or consul; subject nevertheless to such rules and orders touching the personal attendance of any creditor to make such proof according to the existing laws and practice in bankruptcy as the said court of review, with the consent of the lord chancellor, shall from time to time make and direct.

Proof of debts by affidavits.

35. That in every case the assignees may, with the approbation of the proper subdivision court, appoint the bankrupt himself to superintend the management of the estate, or to carry on the trade for behoof of the creditors, and in all or any other respects they may think fit to aid them in administering the bankrupt's estate and effects, in such manner and on such terms as they may think best for the benefit of the persons interested in the estate.

Assignees may appoint the bankrupt to superintend the management of the estate.

36. That the court of review shall have power to remove any assignee of any estate; and the order of such court thereupon shall be final and conclusive to all intents and purposes, and not subject to any review by the lord chancellor or otherwise.

Removal of assignees.

Appeal to the
house of lords.

37. That in case the lord chancellor shall deem any matter of law or equity brought before him by way of appeal from the court of review to be of sufficient difficulty or importance to require the decision of the house of lords, or in case both parties in any proceeding before the court of review shall desire that any such matter may be determined in the first instance by the house of lords, and not by the lord chancellor, then and in such case the lord chancellor or the court of review may direct the whole facts whereupon such question of law or equity shall arise to be stated in the form of a petition of appeal to the house of lords, and the party appealing may carry such appeal to the house of lords in like manner as other appeals are preferred to that house: provided always, that the cases to be lodged by the parties in the house of lords shall be confined in matter of fact, in cases of appeal from the lord chancellor, to setting forth the special case brought up to the lord chancellor from the court of review, and, in cases of appeal from the said court of review, to setting forth a special case, to be approved and certified in manner hereinbefore provided touching appeals to the lord chancellor, and to such arguments on the point of law as the parties may be advised to state.

The court may
take evidence
vivâ voce, or
upon affidavit
before a judge
or a master.

38. That the said judges and commissioners of the said court of bankruptcy shall in all matters within their respective jurisdictions have power to take the whole or any part of the evidence either *vivâ voce* on oath, or upon affidavits to be sworn before one of the said judges or commissioners, or a master, ordinary or extraordinary, in chancery, as the said court may in any case direct, or as the lord chancellor may from time to time prescribe, by any general rule to be made by virtue of this act.

Commissions
depending in
London to be
removed into
the court of
bankruptcy.

39. That all power, jurisdiction, and authority of the commissioners named in any commission of bankrupt depending in the court of commissioners of bankrupts in the city of London shall cease and determine, and that every

such commission shall thereupon be removed into the said court of bankruptcy, and that all further proceeding thereon shall be thenceforth prosecuted and carried on in like manner as if they had been originally commenced therein by virtue of a fiat under the hand of the lord chancellor, issued pursuant to this act, save as may be otherwise directed by this act.

40. That it shall be lawful for each commissioner of the said court who shall thenceforth act in such commission, at his discretion, to appoint some one of the aforesaid official assignees to act with the existing assignees, if any, under such commissions, and to direct the existing assignees to pay and deliver over to such official assignees all monies, books, papers, and effects whatsoever in their possession or custody as such assignees; and all the real and personal estate of the bankrupt under such commission shall immediately on such appointment vest in such official assignee jointly with the existing assignees, if any, in like manner as if the proceedings in the said bankruptcy had originally been commenced by virtue of this act, without prejudice to any action or suit commenced or any contract entered into by the existing assignees at the time of the passing of this act.

Power to appoint official assignees to act with the existing assignees under such commissions, and to whom the latter shall deliver over effects.

41. That wherever this statute hath used words importing the singular number or the masculine gender only, yet it shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and that wherever the words lord chancellor are used, they shall also be understood to mean lord keeper and lords commissioners for the custody of the great seal; and that this act shall not extend either to Scotland or Ireland, except where the same are expressly mentioned or referred to.

Construction and extent of this Act.

**Concerted
bankruptcies.**

42. That from and after the passing of this act no commission of bankrupt shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, his solicitor or agent, or any of them, save and except where any petition to supersede a commission for any such cause shall have been already presented and shall be now pending.

Arbitration.

43. That if the assignees of any bankrupt's estate shall agree to refer any matter in dispute with any party to arbitration, in such manner as by law they are empowered to do, such agreement of reference may be made a rule of the court of bankruptcy by this act constituted, and thereupon all such rights and remedies, duties and liabilities, shall accrue from such reference so made a rule of the said court, in respect of arbitration and award, and nonperformance of such award, and otherwise howsoever, as by law at present accrue upon any submission of reference made a rule of any of his Majesty's other courts of record.

**Abolition of
fees to patentee.**

44. That all fees heretofore payable to the person holding the patentee's office "for the execution of the laws and statutes concerning bankrupts" shall cease and determine; and that no fee whatever shall be payable to any person whomsoever holding any office under or by virtue of this act, except such as are provided by this act, or in the schedules hereto annexed, and except the fees payable to any commissioner acting in the execution of any commission or fiat issued or to be issued, and to be executed elsewhere than in the court of bankruptcy.

**Sum to be paid
to the secretary
of bankrupts on
the granting of
every fiat, and
application
thereof.**

45. That there shall be paid to the lord chancellor's secretary of bankrupts, upon the granting of every fiat, in lieu of a commission of bankrupt, by virtue of this act, the sum of ten pounds; and the sums to be so received by the said secretary shall be by him paid once a week, or oftener, as the lord chancellor shall think fit to direct, into the bank

APPENDIX.

xix .

of England, to the credit of the accountant-general of the high court of chancery, to a separate account, to be entitled "the secretary of bankrupts account;" and all monies to be paid into the said account shall be subject to such general orders touching the payment in, investment, accounting for, and payment out of such monies for the purposes herein-after provided, as the lord chancellor shall from time to time think fit to prescribe.

46. That there shall be paid to the said accountant-general, to be placed by him to the like account by the official assignee of each bankrupt's estate to be administered in the said court of bankruptcy, out of the first monies that shall come into his hands, and immediately after the choice of assignees by the commissioners, the sum of twenty pounds.

Assignee of bankrupt's estate to pay 20*l.* to the like account.

47. That in all cases of commissions of bankrupt which by virtue of the provisions herein contained shall be removed into the said court of bankruptcy, and under which the choice of assignees shall have taken place prior to the commencement of this act, there shall be paid by the assignees of every such bankrupt's estate, in lieu of all other sums directed to be paid under and by virtue of this act, the sum of three pounds on every sitting under such bankruptcy which shall be held in the said court, or by any division judge or commissioner thereof; such sum to be paid to the said accountant-general, and to be carried to the said account entitled "the secretary of bankrupts account:" provided always, that no fee whatever shall be paid on any meeting for the purpose of auditing the assignees accounts, unless there shall appear to the commissioners to be sufficient assets of the bankrupt's estate for the payment thereof.

Sums to be paid on all commissions moved into the court of bankruptcy.

Restriction of fees on auditing assignees accounts.

48. That it shall be lawful for the lord chancellor's secretary of bankrupts for the time being, and his clerks, and he and they are hereby respectively authorized and

Power for the secretary of bankrupts to receive the fees

in the first
schedule.

required, to receive and take the several fees and sums set forth in the first schedule hereto annexed, in respect of the business therein specified ; and the amount to be so received shall be by the said secretary applied in payment of salaries to a messenger and housekeeper, and the various other expences of his office, and the surplus (if any) of such monies shall and may be retained for his own use.

Power for the
chief registrar
to receive the
fees in the
second schedule.

49. That it shall be lawful for the chief registrar of the said court of bankruptcy for the time being, and his clerks, and he and they are hereby respectively authorized and required, to receive and take the several fees or sums set forth in the second schedule hereto annexed, in respect of the business therein specified ; and the amount to be so received shall be by him applied in payment of such salaries or sums of money to clerks, ushers, and other under officers of the said court of bankruptcy, as the lord chancellor may from time to time order and direct ; and the yearly surplus (if any) of such monies shall be divided between the two registrars, or between them and the deputy registrars of the said court, in such proportions as the lord chancellor shall appoint.

Salaries of
judges and
other officers
of the court.

50. That from and after the commencement of this act there shall be paid and payable, out of the monies and securities standing to the said account to be entitled " the secretary of bankrupts account," the yearly sums following, as and for salaries to the judges and other officers for the time being herein-after named ; *videlicet*, to the chief judge of the said court of bankruptcy the sum of three thousand pounds, to each of the other judges of the said court the sum of two thousand pounds, to each of the commissioners of the said court the sum of one thousand five hundred pounds, to the lord chancellor's secretary of bankrupts the sum of one thousand two hundred pounds, to each of the registrars of the said court the sum of eight hundred pounds, to each of the deputy registrars of the said court the sum of six hundred pounds, to the first clerk

of the said secretary of bankrupts the sum of five hundred pounds, and to the second clerk of such secretary the sum of three hundred pounds ; which said several sums shall be paid from time to time quarterly, free and clear from all taxes and deductions whatsoever, on the eleventh day of April, the eleventh day of July, the eleventh day of October, and the eleventh day of January in every year, by equal portions, the first payment thereof respectively to be made on the eleventh day of April next ; and that if any person for the time being holding either of the said offices shall die, resign, or be removed from the same, the executor or administrator of the person so dying, or the person so resigning or being removed, shall be entitled to receive such proportionable part of his salary as shall have accrued during the time that such person shall have executed his office since the last payment ; and that the successor of any such person so dying, resigning, or being removed as aforesaid shall be entitled to receive such portion of his salary as shall be accruing or shall accrue from the day of such death, resignation, or removal.

51. That no judge, commissioner, registrar, or deputy registrar to be appointed by virtue of this act shall during their respective continuance in such offices practise as a barrister, and that no attorney or solicitor whose name shall be on the rolls of the said court of bankruptcy, or of any of his Majesty's courts at Westminster, as such attorney or solicitor, shall be appointed to or hold any of the said offices.

Restriction as to judges and other officers practising as barristers, or being attorneys.

52. And whereas the office of the patentee "for the execution of the laws and statutes concerning bankrupts" is now held by the Reverend Thomas Thurlow, by virtue of a grant thereof by letters patent made to him for the term of his natural life, and the same office hath also been granted by letters patent to the honourable William Henry John Scott for the term of his natural life, after the termination

Provision for compensation to the patentee of bankrupts.

of the previous existing interest therein : and whereas the duties of the said office, and the fees and emoluments payable in respect thereof, will by virtue of the provisions of this act be wholly discontinued ; and it is just and reasonable that such compensation as is herein-after provided should be made to the said patentees, in lieu of such fees and emoluments ; be it therefore enacted, that the accountant-general and the two senior masters of the high court of chancery shall be and they are hereby appointed commissioners for the purpose after mentioned ; and the said commissioners shall, within six months after the passing of this act, by examination on oath or otherwise, which oath they and each of them are and is hereby authorized to administer, inquire into and ascertain the amount of the annual clear legal profits and emoluments of the said office, to be computed on an average of the last three years, (after deducting all payments accustomed to be made thereanent,) and shall certify such amount in writing under their hands to the lord high chancellor, whereupon an annuity equal to such amount shall forthwith become a charge on an account to be opened by the said accountant-general, and to be entitled " the secretary of bankrupts compensation account," and shall be paid and payable to the said Thomas Thurlow during his natural life, and from and after his decease to the said William Henry Scott during his natural life, in case he shall survive the said Thomas Thurlow ; which annuity shall commence and be computed from the eleventh day of January next, and be payable half-yearly by equal portions on the eleventh day of July and the eleventh day of January in every year, the first of such payments to be made on the eleventh day of July next : provided always, that in case of the death of either of the said patentees in the interval between either of the said half-yearly days of payment, his executor or administrator shall be entitled to receive a proportionate part of the annuity then payable to the day of his decease ; and that the said William Henry John Scott, in case he shall survive the said Thomas Thurlow,

shall be entitled to receive on the next half-yearly day of payment after his decease a proportionate part only of his said annuity from the day of such decease.

53. And whereas the duties of the several persons now acting as commissioners of bankrupt in London, and the fees and emoluments accustomed to be received by them, will be abolished by the provisions of this act, and the clerk of the hanaper, purse-bearer, and other officers of the lord chancellor and of the high court of chancery, have been accustomed to receive certain fees, which will also be abolished by this act; and it may be just and necessary that in all or some of such cases compensation should be made in respect of such fees so to be abolished; be it enacted, that it shall be lawful for the lords commissioners of his majesty's treasury, by examination on oath or otherwise, which oath they and each of them are and is hereby authorized to administer, to inquire into and ascertain the annual amount of the lawful fees and emoluments of such commissioners and other officers received by them, and to award to all and every or such one or more of the said commissioners as they the said lords of the treasury shall deem to be entitled to the same an annuity or annuities, of such an amount and for such term as the said lords of the treasury shall find to be a fair and reasonable compensation for the loss to be sustained by all or any of the commissioners and officers aforesaid by the abolition of the said fees, and shall certify the amount of such annuity or annuities, in writing under their hands, to the lord high chancellor, who shall thereupon have power to order the amount so certified as payable to each commissioner or other officer to be paid out of the monies and securities to be standing to the said account to be entitled "the secretary of bankrupts compensation account;" and the same shall be payable and paid accordingly to the respective persons aforesaid, without any deduction whatsoever: provided always, that the annual sum to be so payable to any one of the said commissioners of bankrupt shall not exceed the sum of two

Compensation
to commission-
ers, clerk of the
hanaper, &c.

hundred pounds, and shall not be paid to any such commissioner who at the commencement of this act or at any time afterwards shall hold any public office or employment of an annual value greater than the annuity to be so certified as payable to him, or be in the receipt of any yearly sum of money in lieu of or as a compensation for the proceeds of any such office or employment exceeding in amount such annuity, so long as any such office or employment shall be so held, or such sum of money shall continue to be received.

Proviso as to compensation to clerk of the hanaper.

54. Provided always, that the annuity or compensation hereby directed to be made to the clerk of the hanaper shall be fixed and regulated upon the same computation and in like manner as is above provided with respect to the annuity or compensation for the patentee of the bankrupts office.

Fees to be paid into the bank by official assignee.

55. That for the purpose of raising a fund to meet the compensations herein-before directed to be made to the said patentees and commissioners of bankrupt, there shall be paid by the official assignee of each bankrupt's estate to be administered in the said court of bankruptcy, immediately after the choice of the assignees by the creditors, or so soon afterwards as a sufficient sum shall come into his hands for the purpose, over and beyond the sum herein-before directed to be paid by such official assignee, the sum of ten pounds, into the bank of England, to the credit of the said accountant-general, to be carried to a separate account to be entitled "the secretary of bankrupts compensation account;" and in like manner there shall be paid to the said accountant-general, to be placed by him to the like account, by such official assignee, for every sitting of the said court of bankruptcy, or of any division judge or commissioner thereof, other than the sitting at which any person may be adjudged a bankrupt, or any sitting for the choice of assignees, or any sitting for receiving proofs of debt prior to such choice, or any sitting at which any bank-

rupt shall pass his or her last examination, or any sitting at which any dividend shall be declared, or any sitting at which the bankrupt's certificate shall be signed by the commissioners, the sum of one pound, and for every such sitting at which a dividend shall be declared a sum of money or fee according to the amount at such sitting ordered to be divided, such fee being regulated by the following scale, *videlicet*, for all sums not exceeding ten thousand pounds ten shillings in every one hundred pounds, and for any excess above ten thousand pounds two shillings and sixpence in the one hundred pounds; such several payments to be made within one week after such sittings respectively shall be held; and all monies to be paid into the said last-mentioned account shall be subject to such general orders touching the payment in, investment, accounting for, and payment out of such monies for the purposes herein-before provided, as the lord chancellor shall from time to time think fit to prescribe; and when and as such last-mentioned compensations shall from time to time cease to be payable, it shall be lawful for the said lord chancellor, as he may see fit, to direct that lesser sums shall be paid by the said official assignees at the several times and for the purpose last aforesaid.

56. That if at any time it shall appear to the lord chancellor that the monies and securities standing to the said account to be entitled "the secretary of bankrupts account," together with the fees expectant and to be payable to such account, shall be sufficient to answer and pay the several salaries and other payments for the time being chargeable thereon, and to leave a surplus applicable to the purpose after mentioned, it shall be lawful for the lord chancellor to order such abatement to be made in the fees herein-before made payable by the secretary of bankrupts and by the said official assignees, or by either of them, to the said account to be entitled "the secretary of bankrupts account," as may to the said lord chancellor from time to time seem just and reasonable.

In case of a surplus in the secretary of bankrupts account, the lord chancellor may order an abatement of fees.

Remuneration
to official
assignee.

57. That it shall be lawful for the commissioner before whom any person shall be adjudged a bankrupt in the said court of bankruptcy, or who shall appoint an official assignee under the power herein-before given for that purpose, to order and allow to be paid out of the bankrupt's estate to the official assignee thereof, as a remuneration for his services, such sum of money as shall appear to such commissioner, upon consideration of the amount of the bankrupt's property, and the nature of the duties to be performed by such official assignee, to be just and reasonable.

Penalty on any
officer taking
fees.

58. That if any judge, commissioner, registrar, deputy registrar, clerk, messenger, assignee, or any other officer or person whatsoever shall, for any thing done or pretended to be done under this act, or any other act relating to bankrupts, or under colour of doing any thing under this act or any other such acts, fraudulently and wilfully demand or take, or appoint or allow any person whatsoever to take for him or on his account, or for or on account of any person by him named, or in trust for him or for any other person by him named, any fee, emolument, gratuity, sum of money, or any thing of value whatsoever, other than is allowed by this act, and any other such act as aforesaid, such person, when duly convicted thereof, shall forfeit and pay the sum of five hundred pounds, and be rendered incapable and is hereby rendered incapable of holding any office or place whatsoever under his Majesty, his heirs or successors.

Offences against
this act.

59. That any such offender may be prosecuted either by information at the suit of his Majesty's attorney-general, or by criminal information before his majesty's court of king's bench, or by indictment: provided always nevertheless, that if any registrar, deputy registrar, clerk, messenger, or assignee shall commit any offence against this act, it shall and may be lawful for the court of review or the lord chancellor to dismiss the person so offending, upon proof made before him or them of such offence having been committed, upon a rule to shew cause: provided farther, that if such

court, on cause being shewn, shall think fit to direct an issue to be tried touching the matter of the said charge, such issue may be tried before the said chief judge or one of the other judges of the said court of review.

60. That no judge, commissioner, registrar, or deputy registrar, secretary of bankrupts, or official assignee, or other officer to be appointed by virtue of this act shall, during their respective continuance in such offices, be capable of being elected or of sitting as a member of the house of commons.

Judges and officers under this act ineligible to sit in parliament.

61. That this act shall commence and take effect from and after the passing thereof, as to the appointment of the judges and other officers hereby authorized, and as to all other matters and things, from and after the eleventh day of January next.

Commencement of this act.

APPENDIX.

The First Schedule of Fees before referred to.

	£	s.	d.
For every docket struck, and not acted upon - - - - -	1	12	6
For every renewed fiat - - - - -	0	12	0
For every petition of appeal answered for hearing - - - - -	0	13	6
For every order on hearing - - - - -	1	5	0
For every previous minute of order - - - - -	0	3	6
For every warrant for advertising declaration of insolvency - - - - -	0	2	6
For every certificate of a fiat issued to authorize advertisement in the gazette - - - - -	0	2	6
For every search made for fiat or other proceeding - - - - -	0	1	0
For filing affidavits and other documents - - - - -	0	1	0
For copies of affidavits, orders, and other proceedings, per folio of ninety words - - - - -	0	0	1½

The Second Schedule of Fees before referred to.

	£	s.	d.
On filing every fiat - - - - -	0	1	0
For every certificate of bankrupts conformity - - - - -	0	6	6
On entering every appeal for hearing in the court of review - - - - -	0	2	0
For every order pronounced by that court - - - - -	1	5	0
For every previous minute or order - - - - -	0	2	6
For entering every matter for hearing in a subdivision court - - - - -	0	1	0
For every order pronounced there - - - - -	0	5	0
For fees on the trial of every issue, to be paid by the successful party - - - - -	2	0	0
For every search made in the court - - - - -	0	1	0
For filing affidavits and other documents - - - - -	0	1	0
For copies of affidavits, orders, and other proceedings, per folio of ninety words - - - - -	0	0	1½
For every subpoena ad test. and other writ issued out of the court - - - - -	0	2	0

GENERAL RULES AND ORDERS

IN

BANKRUPTCY.

1. It is ordered that all affidavits and other documents directed to be filed in the Court of Bankruptcy be filed with the registrars of the court.

2. That the Registrars' Office shall be at the Court of Commissioners of Bankrupts in Basinghall Street, in the city of London, and shall be kept open daily, Sundays only excepted, in the morning from 10 to 4, and in the evening from 7 to 9.

3. That attornies and solicitors shall be admitted and enrolled in the Court of Bankruptcy by order of the Court of Review.

4. That every attorney and solicitor of any of the superior courts at Westminster may be admitted and enrolled in the said Court of Bankruptcy, upon the production of a certificate from the proper officer, and upon filing his own affidavit of his being such attorney or solicitor, and of the date of his former admission, such affidavit to be sworn by him, if residing in London, or within ten miles thereof, before the Court of Review, and if residing elsewhere, before a master in ordinary or extraordinary in chancery.

5. That a roll or book shall be kept by the registrars, where shall be enrolled the names of all attornies and solicitors admitted in the Court of Bankruptcy, on payment to the registrar of a fee of 5s. for such admission and enrolment. Such fee to be applied in the first instance to the payment of the expense of preparing such roll and the books necessary for the due registration of the names, and the surplus to the same purpose as the fees in the second schedule of the statute 1 & 2 Will. 4, c. 56.

6. That the registrars or their deputies shall forthwith cause to be prepared a proper alphabetical book for the purposes after mentioned; and that the same shall be publicly kept at the Registrars' Office, to be there inspected by any such attorney or solicitor as aforesaid, or his clerk, without fee or reward; and that every attorney or solicitor admitted in the Court of Bankruptcy, and residing in London, or within ten miles thereof, shall, upon his admission, enter in such book, in alphabetical order, his name and place of abode, or some other proper place in London, Westminster, or the Borough of Southwark, or within one mile of the said office, where he may be served with notices, summonses, orders, and rules in matters depending in the said court; and as often as any such attorney or solicitor shall change his place of abode, where he may be served as aforesaid, he shall make the like entry thereof in the said book; and that all notices, summonses, orders and rules, which do not require personal service, shall be deemed sufficiently served on such attorney or solicitor, if a copy thereof be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney or solicitor shall neglect to make such entry, then the fixing up of any notice, or the copy of a summons, order, or rule, for such attorney or solicitor, in the office of the chief registrar, shall be deemed as effectual and sufficient as if the same had been served at such place of residence as aforesaid.

7. All existing commissions, when transferred to the Court of Bankruptcy, shall be duly registered in the Registrars' Office, in books to be kept for that purpose, and shall be prosecuted before such commissioner as the Court of Review shall appoint.

8. That the assignees appointed under such commissions shall be at liberty to retain, until further order, the custody of the commission and proceedings heretofore taken thereon, according to the present practice in bankruptcy.

9. That all proceedings before the commissioner in the Court of Bankruptcy shall be written on parchment or paper of one uniform size, and shall remain of record in the said court.

10. That every fiat issued by the Lord Chancellor, to be prosecuted in the Court of Bankruptcy, shall be filed of record in the Registrars' Office, within seven days from the date thereof, and that no appointment for the opening of any such fiat shall be made until it shall have been so filed.

11. That upon every application for an appointment for opening any fiat, the registrar shall, in the presence of the solicitor applying for the same, allot such fiat, by ballot, to one of the commissioners of the court, according to the regulations to be from time to time prescribed by the Court of Review, except in cases of second or renewed fiats, which shall go to the same commissioner before whom the former commission or fiat was prosecuted.

12. That upon the making of an appointment for opening any fiat, the registrar shall, in the presence of such attorney or solicitor, write upon the face of the fiat the name of the commissioner before whom the same is to be opened.

13. That each fiat shall be prosecuted before the commissioner so appointed, unless otherwise specially ordered by the Court of Review, or one of the judges thereof.

14. That the commissioners shall sit daily, (Sundays and holidays, to be hereafter named, only excepted,) at 10 o'clock, at the Court of Commissioners of Bankrupts in Basinghall Street, and shall hold their subdivision courts at the same place as occasion may require.

15. That a deputy registrar shall attend upon each commissioner to take minutes of, to draw up, and have the charge of, all proceedings before him, under the superintendence of the chief registrar.

16. That in lieu of attaching a copy of the *Gazette* to the proceedings in each bankruptcy, the deputy registrar shall make a memorandum of the appearance of the advertisement in the *Gazette*, and of the date thereof, with proper reference to the file, to facilitate search.

17. That the official assignees be divided equally among the six commissioners.

18. That each commissioner shall appoint his class of assignees to act in rotation under the several bankruptcies prosecuted before him; such rotation to be settled by ballot, according to such regulations as aforesaid, except in special cases to be referred by the commissioner adjudicating therein to the other commissioners of his Subdivision Court, or the Court of Review.

19. That the same rules for the appointment of official assignees shall be followed as to existing commissions; but it is recommended, that no official assignee be ap-

pointed under commissions already opened, unless there appears good cause for so doing.

20. That the appointment of any assignee or assignees to any bankrupt's estate shall be under the hand of the commissioner, and shall remain of record in the said Court of Bankruptcy; and certificates of such appointment, under the seal of the court, shall be delivered to such assignee by the registrar, upon application for the same.

21. That no official assignee shall either directly or indirectly carry on any trade or business, or hold or be engaged in any office or employment other than his said office and employment as official assignee.

22. That each official assignee shall find sureties to the extent of 6,000*l.*, and shall, together with such sureties, (except where otherwise especially directed by the Court of Review,) execute a joint and several bond to the two registrars for the time being, and the survivor of them, in the penal sum of 6,000*l.*

23. The official assignees to be made liable to the whole amount, and the sureties to be liable together to the like amount, in such proportions as shall be approved of by the Court of Review, provided that no one surety shall be made liable for more than 3,000*l.* nor for less than 1,000*l.*

24. That each official assignee shall, on pain of his dismissal, give immediate notice, in writing, to the chief registrar for the time being, of the death or insolvency of either of his sureties; and shall, if required, cause a new bond to be executed to the like amount by another surety, to be approved of as above.

25. That each official assignee shall follow the instructions of the Commissioner under whom he acts, according to the exigencies of each particular case, subject to such directions as shall from time to time be prescribed by the Court of Review.

26. That each official assignee shall pay into the Bank of England, to the credit of the accountant-general of the High Court of Chancery, all such sums of money as shall come to his hands, as soon as they shall amount to 100*l.*; and at the time of paying in such monies shall state in writing, delivered therewith to the cashier of the Bank of England, the date and the amount of the payment, the name of the official assignee making it, the name and description

of the bankrupt or bankrupts, and the particular estate to which the money belongs, and that it is to be placed to the credit of the said accountant-general, and of such particular estate, and shall take a receipt for the same from the cashier of the Bank, and carry it to the office of the accountant-general, who will give a proper voucher for such receipt, such voucher to be produced when called for by the commissioners.

27. That it is recommended to the commissioners to allow the official assignees 1 per cent. on the monies they respectively receive, and $1\frac{1}{2}$ per cent. more on the monies actually to be divided, subject nevertheless to be increased or diminished in any case under special circumstances; to be referred to the Court of Review.

28. That the messengers shall, upon taking possession, forthwith take an inventory of the bankrupt's effects; but that no appraisement shall be made, or other expenses incurred, without the special direction of the commissioner, until after the appointment of the creditors' assignees.

29. That a table of fees to be allowed to messengers having in the year 1828 been approved of by the then Lord Chancellor, and the duties of messengers having been since diminished, it is recommended to the commissioners that all fees contained in that table, except the following, be for the future disallowed in the taxation of the messengers' bills:—

	<i>s.</i>	<i>d.</i>
Attending the commissioners until the adjudication		
for warrant of seizure - - - - -	10	0
Executing the warrant at each place - - - - -	13	4
Summons to bankrupt to surrender, and duplicate	5	0
Service of summons on bankrupt - - - - -	6	8
Preparing advertisement for the Gazette, and copy, and attending with and for the same - - - - -	6	8
Possession from the day of execution of the warrant of seizure to the choice of assignees, and no longer, per day - - - - -	5	0
Preparing warrant for bringing up the bankrupt from prison, attending commissioner to sign the same, and service on the gaoler - - - - -	13	4
Summons for assignees to attend audit meeting - - - - -	6	8
Preparing summonses, and serving same upon the assignees - - - - -	6	8
Proclaiming bankrupt, when he does not surrender to the commission - - - - -	3	4

In case of committal by the Commissioners.

Taking into custody, and executing their warrant, messenger, and men's attendance, with coach-	s.	d.
hire, and expenses	- 21	0

If, in execution of any of the business above mentioned, the messenger and his man, or either of them, shall be compelled to travel any considerable distance from London, we submit, that besides the above fees, and in addition to travelling and other necessary expenses, an allowance should be made for the time employed at the following rate per day:—

	s.	d.
For the messenger	- 6	8
For his man	- 5	0

30. That all petitions presented to the Court of Review shall be entered at the Registrars' Office, and that the fiat directing the attendance thereon shall be under the seal of the Court of Bankruptcy, and that the original petition shall, when served, be returned to the Registrar on or before the hearing, and be filed of record, and that it shall not be necessary to recite such petitions at length in any order pronounced by the Court thereon.

31. That all the process of the Court of Review shall be under the seal of the Court of Bankruptcy.

32. That all agreements of reference, to be made rules of the Court of Bankruptcy, shall be so made by order of the Court of Review, and all matters arising thereon shall be heard and determined by the Court of Review.

33. That all questions respecting the conduct of the officers and practitioners of the Court of Bankruptcy shall be brought before the Court of Review.

34. That all recognizances to be taken and acknowledged in the Court of Bankruptcy shall be taken and acknowledged before the Court of Review.

35. That the practice in the Court of Review shall, until otherwise ordered, be conformed as nearly as may be to the present practice in matters before the Lord Chancellor.

36. That the First Subdivision Court shall consist of Charles Frederick Williams, Joshua Evans, Robert George Cecil Fane, Esqrs.; and the Second Subdivision Court shall

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xxxv

consist of John Herman Merivale, John Samuel Martin Fonblanque, and Edward Holroyd, Esqrs.

T. ERSKINE, C. J. ALBERT PELL, J.
J. CROSS, J. G. ROSE, J.

Approved, BROUGHAM, C.

January 12, 1832.

Court of Review, Jan. 12, 1832.

IT IS ORDERED, That all commissions of bankrupt heretofore issued and directed to the first and second lists of Commissioners of Bankrupt shall, when removed into the Court of Bankruptcy, be prosecuted before Charles Frederick Williams, Esq.

All commissions directed to the 3d and 4th lists shall, in like manner, be prosecuted before John Herman Merivale, Esq.

All commissions directed to the 5th and 6th lists shall, in like manner, be prosecuted before John Samuel Martin Fonblanque, Esq.

All commissions directed to the 7th and 8th lists shall, in like manner, be prosecuted before Joshua Evans, Esq.

All commissions directed to the 9th and 10th lists shall, in like manner, be prosecuted before Edward Holroyd, Esq.

All commissions directed to the 11th list shall, in like manner, be prosecuted before Charles Frederick Williams, Esq., and Joshua Evans, Esq., or one of them.

All commissions directed to the 12th list shall, in like manner, be prosecuted before John Herman Merivale, Esq., and Edward Holroyd, Esq., or one of them.

And all commissions directed to the 13th and 14th lists shall, in like manner, be prosecuted before Robert George Cecil Fane, Esq.

Provided, that in the absence of any commissioner any other commissioner may sit for him.

BY THE COURT.

IT IS ORDERED, That the fiats upon a petition for hearing in the Court of Review, do direct the attendance of parties thereon to be on the eighth day from the day of presenting every such petition.

The petition to be served four days before the expiration of the time at which the attendance thereon is ordered,

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except in the cases of a petition presented to stay a certificate.

The above directions to be without prejudice to any application to the Court in respect of either the attendance of or service on parties, or the hearing of the petition.

T. ERSKINE, C. J. A. PELL, J.
J. CROSS, J. G. ROSE, J.

MEMORANDUM.

It is to be understood that the eight days and four days respectively, in the directions above mentioned, be taken as inclusive of the days of presenting and of serving such petitions respectively; and exclusive of Sundays, although an intermediate day.

Court of Review, Jan. 16, 1832.

IT IS ORDERED, That all Petitions now depending before the Lord Chancellor in matters of Bankruptcy may be set down for hearing in the Court of Review, upon motion for that purpose.

T. ERSKINE, C. J. A. PELL, J.
J. CROSS, J. G. ROSE, J.

Approved, and let my Secretary of Bankrupts attend the Court of Review with any petitions, copies of petitions, affidavits, or other documents, as the said Court may direct.

BROUGHAM, C.

January 17, 1832.

Court of Review, February 2, 1832.

IT IS ORDERED, That each official assignee shall present for acceptance all unaccepted bills of exchange, as soon as he shall receive the same, and before he deposits them in the Bank of England, as hereinafter directed.

That each official assignee shall deposit in the Bank of England, to the credit of the accountant-general of the High Court of Chancery, all bills, notes, and other negotiable instruments, except unaccepted bills of exchange, as soon as he shall receive the same; and shall deposit in like manner all unaccepted bills of exchange, as soon as the same shall have been accepted, or refused acceptance; and shall at the time of such deposit leave a statement in writing with the cashier of the Bank of England, specifying the date and contents of the instruments so deposited, the

name of the official assignee making the deposit; the name and description of the bankrupt or bankrupts, and the particular estate to which the same respectively belongs; and that such instruments respectively are to be deposited to the credit of the said accountant-general, and of such particular estate; and shall also take a receipt for the same from the cashier of the Bank, and carry it to the office of the said accountant-general, who will give a proper voucher, to be produced when called for by the commissioners.

That when and as soon as any bill, note, or other negotiable instrument, deposited as aforesaid in the Bank of England in the name of the accountant-general, in pursuance of the statute 1 & 2 W. 4, c. 56, or of any order of the Lord Chancellor or the said Court, shall become due, the Governor and Company of the Bank of England shall, without any direction from the accountant-general, deliver all such bills, notes, or other negotiable instruments, to one of the cashiers of the Bank, who is to present the same for payment and receive the sums of money due thereon respectively, and forthwith to pay the sums so received (if any) into the Bank of England, to be there placed to the credit of the said accountant-general, to the credit of the respective estates to which the said bills, notes, or other negotiable instruments were placed at the time of delivering the same to the said cashier.

And in case the said bills, notes, or other negotiable instruments, or any of them, shall not be paid, the said Governor and Company of the Bank of England shall cause such bills, notes, and other negotiable instruments, as are by law required to be noted and protested, to be delivered to a notary for that purpose, and to be noted and protested, accordingly; and shall, after the same shall have been so noted or protested, as the case may be, again deposit the same in the Bank of England to the credit of the said accountant-general, and to the credit of the respective estates to which the same were placed at the time of delivering the same to the said cashier.

And the said Governor and Company shall debit the account of each estate with such sums of money as shall be paid by them for the expenses of noting and protesting such bills, notes, or other negotiable instruments respectively as shall have been placed to the credit of such estate.

And the said Governor and Company of the Bank of England are forthwith, after every such receipt of money or deposit of any note, bill, or other negotiable security, to certify to the said accountant-general the sum of money received (if any) on each such bill, note, or any such negotiable security, and placed to the credit of each such estate as aforesaid, or that such bill, note, or other negotiable instrument has been dishonoured, and been again

deposited to the credit of such estate, as the case may be, and the sum with which each such estate has been debited as aforesaid.

T. ERSKINE, C. J. ALBERT PELL, J.
J. CROSS, J. G. ROSE, J.

Approved, BROUGHAM, C.

February 3, 1832.

Court of Review, February 15, 1832.

As to giving
notice of disho-
noured Bills.

IT IS FURTHER ORDERED, That as often as any bill, note, or other negotiable instrument, that shall have come to the hands of any official assignee, shall be dishonoured, such official assignee shall forthwith give such notice thereof as is by law required from the holder of such bill, note, or other negotiable security respectively.

T. ERSKINE, C. J. ALBERT PELL, J.
J. CROSS, J. G. ROSE, J.

Approved, BROUGHAM, C.

Court of Review, March 19, 1832.

Stating special
circumstances
in Report.

IT IS ORDERED, That in all matters referred by this court to any judge or commissioner of the Court of Bankruptcy, such judge or commissioner may in his report state such special circumstances as he shall think fit, without being specially directed so to do.

Investing mo-
ney in Ex-
chequer Bills.

AND IT IS FURTHER ORDERED, That any one of the judges of the Court of Bankruptcy may, as often as it shall appear to him expedient, by order under his hand, direct any money, which may have been paid into the Bank of England by any official assignee to the credit of the bankrupt's estate, to be invested in the purchase of Exchequer bills; and may in like manner direct the sale or exchange of such Exchequer bills, and also the exchange, sale, and transfer of any stock in the public funds, or in any public company, or of any Exchequer bills, India bonds, or other public securities, which shall have been transferred, delivered, or paid by any official assignee into the Bank of England to the credit of such estate; and may direct the proceeds thereof to be laid out in the purchase of Exchequer bills, or to be carried to the credit of the accountant-general of the High Court of Chancery, and of such bankrupt's estate: and the accountant-general of the High Court of Chancery shall and may, pursuant to such order, make such purchase, sale, and transfer, without any further order or direction from this court; and the

expenses thereof may be charged to the account of the estate for the benefit of which the same shall have been respectively made.

AND IT IS FURTHER ORDERED, That all sums of money which are by law payable out of any bankrupt's estate for allowance to the bankrupt, or for remuneration to the official assignee, or for the discharge of the solicitor's bill, or of any other lawful expenses incurred or payable by the assignees, shall and may, when duly settled and allowed, be paid out of the monies and securities so delivered and paid into the Bank of England as aforesaid, at such times and in such manner as any one of the judges of this court shall, by order under his hand, direct;—provided that such order specify the amount of such payment, the purpose to which it is to be applied, and the person to whom or to whose order the same is to be made. And the accountant-general of the High Court of Chancery shall and may, pursuant to such order, pay the sum of money specified therein out of such bankrupt's estate, without any further evidence of the same being due and payable, and without any further order or direction from this court.

As to the payment of charges and expenses under the commission.

AND IT IS FURTHER ORDERED, That a duplicate of such orders shall be respectively filed with the proceedings in the Court of Bankruptcy.*

T. ERSKINE, C. J. ALBERT PELL, J.
J. CROSS, J. G. ROSE, J.

GENERAL RULE.

Court of Bankruptcy, Tuesday, 27th March, 1832.

IT IS HEREBY ORDERED, That when any certificate of the appointment of an assignee or assignees, hereafter to be made in any bankruptcy prosecuted elsewhere, shall be brought to the registrar of this court, to be sealed pursuant to the act 1 & 2 Will. 4. c. 56. there shall be produced to him duplicate original certificates, written in the form hereinafter mentioned, with an affidavit of an attesting witness to the signatures to both; and that one of such duplicates, together with the affidavit, shall be left with

As to sealing certificates of appointment of assignees in proceedings under a country fiat, see 1 & 2 W. 4. c. 56. s. 29.

* This order does not appear to have been approved by the Lord Chancellor; and perhaps there was no necessity for such approval, as to the greater part of it, under the construction of the 22d section of the 1 & 2 W. 4. c. 56. But *quære*, whether the first part of the order does not, unimportant as the matter is, in strictness require the Chancellor's consent, according to the construction of the 11th section of the above statute. D. & C.

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the registrar, to be filed of record; and the other, when so sealed, shall be returned to the party producing the same.

AND IT IS FURTHER ORDERED, That every such certificate shall (*mutatis mutandis*) be drawn up in the form following:—

“ We the undersigned, being the major part of the persons duly authorized to act as commissioners, in a prosecution of bankruptcy against *A. B.* by virtue of a fiat of the Lord High Chancellor, bearing date the day of in the year , do hereby certify, that *C. D.* and *E. F.* are this day duly appointed assignees of the estate and effects, real and personal, of the said *A. B.*, pursuant to the statutes in such case made and provided.

“ Given under our hands at this
day of in the year

(Signed by three Commissioners.)

“ To His Majesty’s Court of Bankruptcy.”

AND IT IS FURTHER ORDERED, That all such duplicates shall be signed, as often as circumstances will permit, at the meeting where such assignees are appointed. And that no charge shall be allowed to any commissioner for or in respect of any such certificate; nor shall the registrar make any charge for or in respect of the sealing thereof, except the charge allowed by the said act for filing affidavits and other documents.

T. ERSKINE, C. J. ALBERT PELL, J.
J. CROSS, J. G. ROSE, J.

Approved, this 27th day of March 1832.
BROUGHAM, C.

Court of Review, March 28, 1832.

IT IS ORDERED, That when a dividend has been or may be declared under any commission, and where any part of the bankrupt’s estate shall have been paid into the Bank of England by any official assignee to the credit of the accountant-general of the High Court of Chancery and of such bankrupt’s estate, any one of the judges of this court may, by order under his hand, direct the sum ordered to be divided, or such part thereof as may be required, to be carried over from such account to an account to be opened in the books of the Bank of England in the name of the same estate, to be intituled “ The Dividend Account,” in

As to the regulation of the dividend account at the Bank.

which order shall be specified the names of the chief registrar of the Court of Bankruptcy for the time being, and of the official assignee appointed to such estate; and the judge shall execute two parts of his said order, one part of which shall be filed and remain of record with the proceedings in such bankruptcy, and the other part shall be delivered by the official assignee to the said accountant-general, who shall thereupon by his certificate direct the sum specified in the judge's order to be carried over as aforesaid, and shall in such certificate state the names of the chief registrar and official assignee mentioned in the judge's order, and shall direct the cashiers of the Bank to pay the money so carried over to the drafts of the official assignee, countersigned by the chief or other registrar duly authorized to countersign the same, and such transfer shall be made accordingly, and the cashiers of the Bank shall, out of the monies so carried over, pay all drafts so drawn and countersigned as aforesaid.

AND IT IS FURTHER ORDERED, That when any such order of dividend shall have been made, the solicitor to the commission shall forthwith make out a list of the creditors, and shall place in separate columns, after the name of each creditor, the amount of his debt, and the sum which he is entitled to receive in respect thereof, by virtue of such order of dividend, leaving another column in blank for the purpose hereinafter mentioned, and shall to each name prefix a number in regular series, and shall sign such list, and lay it before the assignees chosen by the creditors, who shall examine and sign the same, and the solicitor shall then deliver the list to the official assignee, who shall examine and sign the same if correct, and shall take a copy thereof, and shall deliver the original to the chief registrar.

Solicitor to make out a list of creditors after an order of dividend, and deliver it to the Official Assignee.

AND IT IS FURTHER ORDERED, That the chief registrar shall, upon the receipt of the said list, deliver to the official assignee books containing as many blank drafts and receipts as may be necessary, and in such form as shall from time to time be prescribed by this court, and the official assignee shall number and fill up a draft for each dividend, by inserting in each draft the name of the creditor to which the number of such draft is prefixed in the list, and the dividend payable to him; and the official assignee shall take the draft book so filled up to the chief registrar, who shall compare the same with the list in his possession, and shall sign all such drafts as he shall find correctly drawn, and in case of any error shall cancel such drafts as are incorrectly drawn, and fill up and sign others in lieu thereof, and shall return the draft book so signed to the official assignee for the purposes hereinafter mentioned, who shall

Regulations as to signing drafts for the payment of dividends;

thereupon number and fill up the receipts to correspond with the drafts so signed.

and the production of securities held by the creditor.

AND IT IS FURTHER ORDERED, That when any such creditor or any person duly authorized under his hand to receive his dividend shall apply for payment, the official assignee shall require the production of such securities (if any) as the creditor may hold for such debt, and if satisfied that the amount of the said dividend still remains due, shall fill up the date in the draft and receipt; and upon the creditor, or such other person authorized as aforesaid, signing the receipt for such dividend, the official assignee shall mark the securities (if any) with the amount of that dividend, and shall sign and deliver the draft for the same; provided that no dividend shall be paid to any creditor holding any security for his debt until such security shall be produced, without the special directions of the commissioner in that behalf.

Commissioner may alter lists and cancel drafts.

AND IT IS FURTHER ORDERED, That if, after such list shall have been so made and signed, it shall from any cause seem expedient and just to the commissioner that such list should be altered, the said commissioner may make such alterations as to him shall seem just, or may direct a new list to be made, and may thereupon cancel all such drafts (if any) as shall be thereby rendered useless, and direct other drafts to be drawn corresponding with the amended or new list (as the case may be), and the registrar and official assignee shall thereupon fill up and sign such new drafts, and pay the same to the several creditors, as hereinbefore directed. Provided that every such alteration in the amount of a dividend shall be inserted in the blank column of such list, and shall be signed by such commissioner, and that every new list shall be signed by the commissioner and official assignee before any draft shall be drawn in pursuance thereof.

As to re-transfer of unappropriated funds.

AND IT IS FURTHER ORDERED, That when any part of the money so transferred by the said accountant general shall become and remain unappropriated to the payment of any such dividend, the commissioner may, by order under his hand, direct such residue to be carried back to the account from which it was originally transferred, and the same shall thereupon be carried back accordingly, and a certificate of such transfer shall be sent to the office of the said accountant general.

Provision for the signature of drafts on the death, &c. of the Chief Registrar.

AND IT IS FURTHER ORDERED, That when in consequence of the death, sickness, or unavoidable absence of the chief registrar, or for any other sufficient cause, it may be expedient to appoint some other person to sign drafts, or to do any other act hereby required from the chief registrar, any

one of the judges of this court may, by order under his hand, to be executed in duplicate, name and appoint one of the deputy registrars to act for the chief registrar in that behalf, one part of which order shall be left by the deputy registrar named in such order at the Bank of England, who shall, at the same time, sign his name in the firm book kept at the Bank for such purpose, and the other part of such order shall be filed with the proceedings in that bankruptcy, and thereupon all drafts for that dividend signed by such deputy registrar shall be payable and paid, as if the same had been signed by the chief registrar named in the certificate of the said accountant-general.

AND IT IS FURTHER ORDERED, That when, in case of the death, removal, sickness, or unavoidable absence of any official assignee named in the certificate of the accountant-general, any other shall be appointed to act in his stead, the official assignee so appointed shall leave at the Bank a certificate of his appointment under the seal of the court, and shall at the same time sign his name in the said firm book, and thereupon all drafts for that dividend drawn and signed by such official assignee shall be payable and paid as if they had been signed by the official assignee named in the certificate of the said accountant-general.

AND IT IS FURTHER ORDERED, That any one of the judges of this court may, from time to time, upon application made to him in that behalf, make such order relative to the payment and delivery in, investment, and payment and delivery out, of the monies, bills, securities, and other effects of any bankrupt, in the hands of any official assignee, or by him paid and delivered into the Bank of England, as to such judge shall seem expedient and just, such order to be executed in duplicate, and one part thereof to be filed with the proceedings, and the other to be delivered to the official assignee.

AND IT IS FURTHER ORDERED, That when and so often as any Exchequer bill or bills deposited in the Bank of England to the credit of the accountant-general of the High Court of Chancery, and of the estate of any bankrupt, pursuant to the statute 1 & 2 Will. 4. c. 56. or to any order of this court, shall be in course of payment, the governor and company of the Bank of England shall and may, without any direction from the accountant-general, cause all such bills so in course of payment to be delivered to one of the cashiers of the Bank, who is to receive the interest due thereon, and exchange the same for new bills, in case such new bills are issued, or otherwise to receive the principal money and interest due on such of the said bills so in course of payment as cannot be exchanged, and pay

Provision in case of the death, &c. of the Official Assignee.

One of the Judges may make any order as to the payment and delivery of monies, bills, &c.

Regulation as to the payment and re-investment of Exchequer Bills.

the said interest, or principal and interest, (as the case may be,) into the Bank of England, and deposit all such new bills in the Bank, to be there placed to the credit of the said accountant-general and of the same bankrupt's estate to which the former bills were, at the several times of delivering the same to the cashiers for the purpose aforesaid, placed. And the said Governor and Company of the Bank of England are forthwith after every such exchange and receipt of interest, or of principal and interest, to certify to the said accountant-general, without any direction from him for that purpose, the numbers, dates, and sums of the new bills taken in exchange, and the amount of the interest, or principal and interest, (as the case may be,) received on each bill, or set of bills, placed to the same account.

AND IT IS FURTHER ORDERED, That these orders be entered with the registrar of this court, and copies of them, signed by the chief registrar, be sent to the accountant-general of the High Court of Chancery, and to the Governor and Company of the Bank of England.

T. ERSKINE, C. J.	ALBERT PELL, J.
J. CROSS, J.	G. ROSE, J.

2 & 3 Gul. IV. Cap. 114.

An Act to amend the Laws relating to Bankrupts.

[15th August 1832.]

WHEREAS by an act passed in the sixth year of the reign of his late Majesty, intituled “ An act to amend the laws relating to bankrupts,” it is among other things enacted, that the Lord Chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy to be entered of record by a proper person, to be appointed by the Lord Chancellor for that purpose, or by his deputy: and whereas the said act contains no sufficient provision for making such depositions or office copies of the record thereof evidence, and is in other respects defective: and whereas by an act passed in the first and second years of the reign of his present Majesty, intituled “ An act to establish a court of bankruptcy,” it is amongst other things enacted, that every fiat prosecuted in the said court of bankruptcy shall be filed and entered of record in the said court: and whereas the said last-mentioned act contains no provision for the entering of record in the said court fiats prosecuted elsewhere, and the depositions and proceedings under such fiats, or for the proof thereof: and whereas it is expedient that the record of all matters in bankruptcy should be under the same custody; be it therefore enacted by the King’s most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that the records of all commissions of bankrupt, and of all proceedings under the same, which may have been heretofore entered of record pursuant to or under colour of the said first-recited act or any other

6 G. 4. c. 16.
1 & 2 G. 4. c. 56.

Providing for the custody of records under former commissions of bankrupt.

act, shall be removed into the said court of bankruptcy, and shall be kept as records of the said court in such place as the judges of the said court shall from time to time direct; and that it shall and may be lawful for the judges of the court of bankruptcy to nominate the person heretofore appointed by the Lord Chancellor to enter such proceedings of record, or, in case of his refusal to accept such office, some other fit and proper person, as the clerk of enrolment to the said court, at such salary, to be paid out of the fees herein-after mentioned, as the Lord Chancellor shall by writing under his hand direct; and that such clerk of the enrolments and his successors (to be appointed in like manner, at the like salary,) shall have the care and custody of all the said records so removed as aforesaid, and shall in like manner enter of record all matters and proceedings in bankruptcy which by this act or by the said recited acts, or by any order made in pursuance thereof, are or may be directed to be entered of record, upon payment of the fees herein-after mentioned.

Matters inrolled before Sept. 1825 deemed to be effectually entered of record.

2. Provided always, and be it declared and enacted, that all commissions of bankruptcy issued before the first day of September one thousand eight hundred and twenty-five, and all depositions and other proceedings relating to such commissions, directed to be inrolled, and actually entered of record upon or since that day, shall be deemed and taken to have been well and effectually entered of record.

Certificate of such entry to have the same effect as if commission had been issued before Sept. 1825.

3. Provided nevertheless, and be it further enacted, that the certificate of such entry, purporting to be signed by the person appointed to enter such proceedings, or by his deputy, shall have the same effect as if such commission had been issued after the said first day of September one thousand eight hundred and twenty-five, and shall be received in evidence without proof of the appointment or handwriting of such person.

4. And be it enacted, that any one of the judges of the court of bankruptcy shall have full power and authority, upon application made to him for that purpose, to direct such officer to enter upon the records of the court any commission of bankrupt at any time heretofore issued, and the depositions and proceedings had and taken under the same, or such part or parts thereof as such judge shall think fit: provided always, that it shall and may be lawful for such officer to enter of record the several matters directed by the said recited Acts or either of them to be entered of record, upon the application of or on behalf of any party interested therein, without any special order for that purpose.

Judges may order commissions to be entered on record.

Certain matters may be entered on application of parties.

5. And be it further enacted, that all fiats already issued or hereafter to be issued in lieu of commissions of bankrupt to be prosecuted elsewhere than in the said court of bankruptcy, and all adjudications of bankruptcy by the persons named in such fiats to act as commissioners, and all appointments of assignees, and certificates of conformity, made and allowed under such fiats, may and shall be entered of record in the said court of bankruptcy, upon the application of or on behalf of any party interested therein, on the payment of the fees hereafter mentioned, without any petition in writing presented for that purpose; and that any one of the judges of the said court may, upon petition, direct any deposition or other proceeding under such fiat to be entered of record as aforesaid.

Fiats to be entered of record, on application of any interested party.

6. And be it further enacted, that there may and shall be paid for the entry of every commission and fiat the fee of two shillings, and for the entry of every certificate of conformity and of every assignment the fee of six shillings each, and for the entry of every examination such fee as the court of review shall from time to time fix and appoint, not exceeding the rate of one shilling for every folio

Fee for entry of commissions and fiats.

thereof, and for the entry of every adjudication of bankruptcy, deposition, appointment of assignees, and every other proceeding or matter relating to commissions or fiats, the fee of two shillings each; which fees shall be paid to the chief registrar for the time being, and shall be applied by him to the payment of the expences of such enrolment and the salary of such officer; and the balance thereof, if any, shall be applied to the payment of such other expences attending the said court of bankruptcy as the judges thereof, with the consent of the Lord Chancellor, shall from time to time direct.

Provision in
case of the death
of witnesses.

7. And be it further enacted, that in the event of the death of any of the witnesses deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any commission or fiat already issued or hereafter to be issued, it shall be lawful for the assignees appointed under such commission or fiat, and for all persons claiming through or under them, or acting by or under their authority, in the cases hereafter mentioned, to produce and read in evidence, in all courts of civil judicature, and in all civil proceedings, in maintenance and support of such commission or fiat, any deposition of such deceased witness relative to such petitioning creditor's debt, trading, or act of bankruptcy, which shall have been duly entered of record pursuant to the provisions of the said recited acts or of this act; and the production or reading of such depositions, or of any copy thereof, duly authenticated according to the provisions of the said recited acts or of this act, shall have the same effect as if the matters alleged therein had been deposed to by the same witness in such court according to the ordinary course and practice thereof: provided always, that the before-mentioned depositions shall be read in evidence in such cases only where the party using the same shall claim, maintain, or defend some right, title, interest, claim, or demand which the bankrupt might have claimed, main-

tained, or defended in case no commission of bankrupt or fiat had issued, and shall not be read in evidence in any action or proceeding now pending by which the validity of any commission or fiat is or may be brought into question.

8. And be it further enacted, that no fiat issued or to be issued in lieu of a commission of bankrupt, whether prosecuted in the court of bankruptcy or elsewhere, nor any adjudication of bankruptcy or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any court of law or equity, unless the same shall have been first entered of record in the court of bankruptcy as aforesaid.

No fiat to be received in evidence unless first entered of record.

9. Provided always, and be it further enacted, that upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said court of bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record as aforesaid, without any further proof thereof: provided nevertheless, that all fiats, and proceedings under the same, which may have been entered of record before the passing of this act, shall and may, upon the production thereof, with the certificate thereon, purporting to be signed by the person so appointed to enter proceedings in bankruptcy, or by his deputy, be received as evidence of the same having been duly entered of record, any thing herein contained notwithstanding.

Proceedings in bankruptcy, purporting to be sealed with the seal of the court, to be received as evidence.

10. And whereas by the said recited act of the first and second years of the reign of his present Majesty it is amongst

Lord Chancellor empowered to direct certain

monies standing to the credit of the secretary of bankrupts account to be carried to the secretary of bankrupts compensation account, and vice versa.

other things enacted, that several sums therein specified shall be paid into the bank of England, to the credit of the accountant general of the high court of chancery, to an account to be intituled "The Secretary of Bankrupts Account," and that all monies so paid shall be subject to such general orders for the purposes therein specified as the Lord Chancellor shall prescribe; and it is further enacted, that compensation shall be made to certain officers therein named, in lieu of certain fees and emoluments by the said act abolished, and that for the purpose of raising a fund to meet the said compensation certain sums in the said act specified shall be paid into the bank, to the credit of the said accountant general, to a separate account to be intituled "The Secretary of Bankrupts Compensation Account:" and whereas the sums paid in to the credit of the said first account are more than sufficient to meet the sums at present payable out of the same, and the sums paid in to the credit of the second-mentioned account are at present insufficient to meet the payments directed to be made out of the same, and it may be expedient that power should be given to the Lord Chancellor to apply one of those funds in aid of the other, from time to time, as occasion may require; be it therefore enacted, that it shall and may be lawful for the Lord Chancellor by his order to direct, from time to time as he may see fit, that the monies standing to the credit of the account intituled "The Secretary of Bankrupts Account," or so much thereof as he may find to be necessary, shall be carried over by the said accountant general to the credit of the account intituled "The Secretary of Bankrupts Compensation Account," and the same when so carried over shall and may be applied in satisfaction of any sum or sums charged upon or made payable out of the said last-mentioned account; and in like manner to direct, from time to time as he may see fit, that the monies standing to the credit of the account intituled "The Secretary of Bankrupts Compensation Account," or

APPENDIX.

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so much thereof as he may find to be necessary, shall be carried over by the said accountant general to the credit of the account intituled "The Secretary of Bankrupts Account," and the same when so carried over shall and may be applied in satisfaction of any sum or sums charged upon or made payable out of the said last-mentioned account.

ERRATA.

Page 303, last word, *for* “reversed” *read* “affirmed.”

Page 401, line 7, *for* “applied” *read* “implied.”

Page 430, line 7 from the bottom, fill up blank with “*Hodges* and other cases in 1 *Gl. & J.* 158.”

Page 444, supply references to pages in cases in note thus—(d) 1 *Ba. & Be.* 260. (e) 1 *Bro. C. C.* 398. (f) 2 *Bro. C. C.* 490.

Page 450, note (g), *for* 395 *read* 595.

Page 454, *for* “Mr. *Stewart*” *read* “Mr. *Blunt.*”

Same page, *Ex parte James*, in the matter of *Hughes*, is erroneously reported. The order made was, that the third meeting should be adjourned.

INQUIRIES.

OUGHT a bankrupt to be entitled under any and what circumstances to call upon a creditor to shew cause why his certificate should not be allowed?

By the existing bankrupt law a creditor whose debt amounts to 20*l.* has an arbitrary power to refuse his consent to the bankrupt's certificate; that is, he may, without reason and without controul, be the cause either of the bankrupt's not having any interest in his future earnings, which may paralyze every industrious disposition, or of imprisoning the bankrupt until his debts are paid; which, as the whole of his property is distributed amongst his creditors, might, previous to the insolvent act, have been imprisonment for life, and now may be imprisonment for five years; and this civil death or paralysis may be inflicted without an appeal to any tribunal upon earth—

Sic volo: sic jubeo: stet pro ratione voluntas—

satisfies the legislature.

In March 1809, Sir *Samuel Romilly* brought in a bill to alter this law, and to advance the doctrine of the forgiveness of debtors. He did not act hastily or upon any wild speculation to mitigate severity: the injury, he knew, which a creditor sustains is the loss of his property, from the misfortune or from the fault of his debtor; which fault may be either misconduct after possession of his property has been obtained, or deceit in obtaining the possession; and this deceit may be of such a nature as to be capable of being explained to a public tribunal, *as in the common cases of fraud*; or so subtle as to be inexplicable, as in *the abuses of confidence by a familiar friend*; which, peradventure, cannot be borne.

Admitting that there are some crimes which are beyond the power of any legislature to redress; that no sharper anguish is felt than that which cannot be complained of, nor any greater cruelties inflicted than some which no human authority can relieve; admitting that some miseries are too deeply seated to be cured by constraint of law, Sir *Samuel* thought, that if a party injured must be permitted to be judge in his own cause, there ought to be some check upon the excesses of the power entrusted to him. He thought that, although the private gratification of injured feeling might, possibly, in some cases, be allowable, yet that there ought to be a limit to its indulgence.

Admitting that for a reasonable time every creditor should be entrusted with an arbitrary power to withhold his assent from the bankrupt's certificate, Sir *Samuel* thought that after a certain time, a debtor who had obtained the signature to his certificate of a certain proportion of his creditors, should be permitted to call upon a dissenting creditor to shew cause why his certificate should not be allowed by the Lord Chancellor.

Sir *Samuel* proposed that, after a specified time, the bankrupt ought to be permitted to compel a dissenting creditor to shew cause why his certificate should not be allowed.

Sir *Samuel's* speech, as printed in his life, is as follows : —

“ The next amendment which I shall submit to the House is, of all the others, that of the greatest importance. It is to take from the creditors the power which they now possess (without any controul, and without the obligation even to assign a reason for their conduct) of refusing, at their own pleasure, a certificate to the bankrupt. Let the House consider the situation of an uncertificated bankrupt. It is, in any point of view, most deplorable. Without the means of acquiring property ; for whatever he gains may be instantly seized upon by the assignees ; his industry is lost to his family and to his country ; and though he hath surrendered upon oath his last shilling, he is still liable for debts due before the bankruptcy, and may be imprisoned for life in consequence of engagements which he has not the possibility to discharge. By a statute passed in the early part of the reign of *George II.* this power was given to the Chancellor ; but by a subsequent statute of the same reign, it was enacted, that a bankrupt should not receive his certificate without the consent of four fifths in number and value of his creditors ; so that, however honourable and just in a moral point of view, the bankrupt's conduct may have been ; however inevitable his misfortunes, he is to labour under all the evils described, unless perchance relieved by the favour of his relenting creditors. And with whom does this power of relief in general rest ? Frequently with a small number of the creditors ; sometimes with a single one, whose debt may happen to bear a large proportion to those of the other claimants. Hence, cases have occurred in which the will of one individual has prevented the bankrupt from obtaining his certificate. But this is not the only hardship to which the bankrupt is exposed by the statute just alluded to. Although unable to prove under the commission, or to receive a dividend, yet any creditor may join in withholding the certificate, and may subsequently imprison the bankrupt for life.

“ I am aware that this part of the subject involves another and a most serious consideration, the policy of imprisonment for debt. Though far from being disposed to enter upon the question at the present moment, I cannot help incidentally observing, that, in my opinion, an individual could scarcely render a greater service to his country than by procuring the abolition of such a punishment altogether. It is mischievous to the individual ; it is pernicious to the public ; and though the imprisonment may, in many cases, be just, yet it is certain that in many others it is equally unjust. But with respect to an uncertificated bankrupt, it is *always* unjust ; for the only object of the punishment is to compel him to do that which the law supposes impossible,—which it has indeed rendered it impossible for him to perform, without hazarding the penalties of a capital felony. The punishment, therefore, in *this* case *must* be unjust. But consider only the circumstances under which it is inflicted, the relative situation of the parties concerned, and the consequences which must frequently result from such a state of things. Think of an individual vested with judicial power in his own cause, and over one, who may, who must have

offended him, by defeating, however innocently or reluctantly, his legal claims. What must be the condition of the unfortunate bankrupt so situated, exposed without defence to the discretion of his irritated creditor and judge, destitute alike of all remedy or hopes of relief, except from the mercy of an enraged enemy? How frequently has this power been rendered subservient to the gratification of the basest and most malignant passions! How frequently has the revenge of an envious competitor been satiated by the imprisonment of his victim for life! Indeed it is scarcely possible to appreciate the extent of misery and evil which such a state of things is calculated to produce.

“Paradoxical as it may appear, it is not less true, that certificates are more frequently withheld from the candid and honest than from the fraudulent bankrupt. They are often withheld by some one or two rapacious creditors, for the purpose of extorting money from the friends, perhaps from a son, a brother, or a father of the bankrupt, and of thus securing to themselves an undue advantage over the other claimants. What a temptation to fraud does this hold out to the bankrupt,—a temptation, which, though far from justifying his weakness or want of moral principle, nevertheless ought not to be thrown in his way! I speak not from conjecture, but from experience. It has not unfrequently induced the bankrupt to withhold a part of his property from his honest creditors, as a bribe for the favour of some less conscientious and merciful claimant; or if thwarted in that object, and betrayed into a full disclosure of his effects, it at least deters him from giving that assistance to the commissioners in investigating the validity of his debts, which, under other circumstances, it would be as much his interest as his inclination to offer. In a case which has recently occurred in the Court of Chancery, it appeared that a creditor had refused to sign a certificate, because the bankrupt had suggested, what turned out to be the fact, that he was endeavouring to prove a larger debt than was really due. Another evil is, that until a bankrupt has obtained his certificate, he cannot be a witness in any thing relating to the estate. Here is a further impediment in the way of the certificate; for it often happens, that a creditor, on whose discretion the allowance of it may depend, is involved in some contest respecting the bankrupt's effects, and is interested in excluding his testimony. The certificate is consequently withheld, to the serious detriment of the bankrupt, and, perhaps, still more to the defeat of justice, which might have rested on his evidence. Such are the consequences of a law which makes a man the judge and executor in his own cause!

“The House will perhaps hear with surprise, that for some years past there have been more cases in which certificates have been withheld than granted. From a calculation which I have been enabled to make on the subject, it appears that in the year 1805 there were 940 commissions issued in England, under which only 405 certificates have been granted; that in 1806 there were only 1,084 commissions, and only 383 certificates; and that during the last twenty years, under 16,202 commissions of bankruptcy which have been taken out, there are only 6,597 cases where the certifi-

cates have been allowed. It may be asked, whether no remedy has been ever suggested for an evil of such magnitude? Temporary, and therefore insufficient, remedies have been from time to time applied. In 1772 a clause was introduced into the Insolvent Act to compel creditors to give certificates where there had been nothing fraudulent in the conduct of the bankrupt. In 1778, a similar enactment passed the legislature. But the relief was confined to cases which had happened previously to those periods. These are the only two instances which have occurred in this country, and they proceeded on a principle to me altogether incomprehensible. If it was unjust in 1772, or 1778, that a bankrupt should remain at the mercy of his creditors, it is equally so now, and at every other time. The remedy, therefore, ought not to be temporary, but permanent. In Ireland, these temporary expedients have been more frequent than in this country. Measures similar to those adopted here received the sanction of the Irish Parliament in 1786, in 1797, in 1799, and in 1800; so that had it not been for the Union this remedy was in a fair way of becoming the subject of an annual law. But since the Union, no such temporary act has been passed; and the distress that must have been produced by this suspension of a remedy (the nature of which at least proves the necessity of some legislative measure) may be more easily imagined than described. The remedy I would suggest is, not to take the power altogether out of the hands of the creditors; but to enable the bankrupt, where his certificate has been withheld for the space of two years, to petition the Chancellor to allow it, who, after hearing the creditors, shall decide upon the merits, and allow or withhold the certificate, as the justice of the case may require. The only objection to this remedy, as far as I can judge, is, the additional expense which it might occasion in these proceedings; to obviate which, I would propose, that the additional process should be exempt from the stamp duty. Indeed, all taxes on law proceedings are highly objectionable. With the sole exception of lotteries, no mode of increasing the revenue is so injurious to the interests of the people. I know that this is not a popular sentiment, but it is only so because the subject has not been duly considered. But if there is any case in which the obtaining of justice should be rendered as easy and little expensive as possible, it ought to be that where the individual concerned is struggling as well for his liberty as for the honest means of rendering his industry available to himself and to all around him. This is the only part of the bill which I intend should have a retrospective operation. I shall propose that all uncertificated bankrupts who have passed the examination two years shall be entitled to the benefits of the measure."

The measure was opposed in the Commons by Mr. *Giffin Wilson* and Mr. *Jacob*, and it was rejected in the Lords. Some of the debates may be found in the Parliamentary Reports. The arguments in favour of the measure considered the *motives* by which the creditors must be actuated in dissenting from the certificate, and referred, as proof of these motives, to the *effects* of the law.

(To be continued.)

DIGESTED INDEX

OF THE

CASES IN THIS VOLUME,

AND OF THE

CONTEMPORANEOUS CASES DECIDED IN THE COURTS OF LAW.

ACQUIESCENCE.

1. What amounts to. Ex parte *Hill*, 1 Mont. 9.

2. Signing a deed reciting the bankruptcy is an acquiescence in the validity of the commission. Ex parte *Hall*, 1 Mont. 354.

ACT OF BANKRUPTCY.

Absenting.

1. Absenting, unless from the place of abode or of business, or to avoid a creditor, is not an act of bankruptcy. *Bernasconi v. Farebrother*, 10 B. & C. 549.

2. If a trader, fearful that he may receive an unpleasant letter from a creditor, quit his house, and desire the letter to be forwarded to him at a turnpike; and if the letter was unfavourable, it was not his intention to return; but, if favourable, it was his intention to proceed on his regular business; and the letter which is favourable is forwarded, and he proceed on his regular business: it is not an act of bankruptcy. *Fisher v. Bomber*, 10 B. & C. 710.

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3. One of three partners, bankers, left his house at Bath, and went to London to raise funds; and having failed in his efforts to do so, he remained there three days. Held, that the jury were warranted in finding that he absented himself with an intent to delay his creditors. *Cumming v. Baily*, 4 M. & P. 36.

Fraudulent Conveyance.

4. It has been said that to constitute an act of bankruptcy by a fraudulent sale the fraud must be known by the buyer. D. Lord Tenterden. *Cook v. Caldecot*, 4 C. & P. 315.

5. The word voluntary in 7 Geo. 4. c. 59. s. 32. means an assignment made without such valuable consideration as is sufficient to induce a party acting really and *bonâ fide* under the influence of such consideration, as an assignment made in favour of a particular creditor spontaneously, and without any pressure on his part to obtain it. *Arnell v. Bean*, 8 Bing. 90.

6. An ante-nuptial settlement may be an act of bankruptcy. Ex parte *Mayor*, 1 Mont. 292.

7. To invalidate a deed by the

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ACT OF BANKRUPTCY.

statute of Elizabeth, it is not necessary to show that the party was insolvent. The question is, whether the deed was made to hinder and delay his creditors, by placing the property out of their reach. *Richards v. Smallwood*, Jacob, 557.

8. As to a fraudulent power of attorney, see *Sharpe v. Thomas*, 6 Bing. 416.

9. If an insolvent debtor apply for his discharge, a security obtained by a creditor, who threatens an opposition, to cease opposing, is void. *Rogers v. Kingston*, 10. B. Moore, 97.

10. If an insolvent, having petitioned the Court for the Relief of Insolvent Debtors to be discharged, and having been brought up before the Court to be examined, is opposed by a creditor and remanded to a future day, and before the arrival of this day the assignees of the insolvent, in consideration of the creditor's withdrawing his opposition to the insolvent's discharge, undertake that the creditor shall be the sole assignee, and shall receive 100*l.* out of the estate within three weeks from his appointment, the agreement is void. *Murray v. Reeves*, 8 B. & C. 421.

11. A fraudulent sale is an act of bankruptcy. *Cook v. Caldecott*, 1 Moody & M. 525.

12. The word fraudulent in 6 G. 4. c. 16. s. 3. applies to each of the words gift, delivery, and transfer. *Cook v. Caldecott*, 1 Moody & M. 525.

13. A bill of exchange is a chattel, and within the third section of the 6 Geo. 4. c. 16; and a fraudulent delivery or transfer of such bill by a trader to a creditor constitutes an act of bankruptcy. *Cumming v. Baily*, 4 Moore & Payne, 36.

Keeping House.

14. An order to deny, without an

actual denial, is not sufficient to constitute an act of bankruptcy. *Fisher v. Bomber*, 10 B. & C. 710.

15. An order to deny, with any act done, as retiring to an unusual part of the house, is an act of bankruptcy. *Fisher v. Bomber*, 10 B. & C. 710.

16. Two of three partners, bankers, ordered the doors and windows of the bank to be closed, and a placard was posted on the door announcing that they had suspended payment: Held that this was beginning to keep house within the third section of the stat. 6 Geo. 4. c. 16, and an act of bankruptcy, although neither of the partners lived in the banking-house. *Cumming v. Baily*, 4 Moore & Payne, 36.

17. A trader was denied to a creditor calling for payment, but the creditor saw him peeping over his wife's shoulder; another time, perceiving a creditor, he retired behind a partition at the back of his shop, and his wife said he was not at home: Held that the Judge properly directed the Jury to consider whether the trader "had kept his house; had wilfully secluded himself; that is, had withdrawn himself from a part of the house where he was likely to meet a creditor to a more retired part." *Key v. Shaw*, 8 Bing. 320.

Lying in Prison.

18. The act of bankruptcy by lying in prison for twenty-one days has not a relation to the first day of the arrest. *Moren v. Newman*, 6 Bing. 556, 4 M. & P. 333; *Higgins v. M'Adam*, 3 Y. & J. 1.

19. A commission cannot be supported by an act of bankruptcy by lying in prison, unless the trading were before the imprisonment. Ex parte *Lynch*, 1 Mont. 453.

AFFIDAVIT.

AFFIDAVIT.

1. When the petitioner filed his affidavits only a day before the day of hearing, the Court refused the costs of the day. *Ex parte Billings*, 1 D. & C. 42.

2. An affidavit filed the evening before the hearing not admissible if there were laches. *Ex parte Hall*, 1 Mont. 5.

3. Notice must be given to read affidavits filed in support of a petition to the Chancellor, and transferred to the Court of Review. *Ex parte Donaldson*, 1 D. & C. 36.

4. An affidavit to prove a foreign debt must be attested by a notary abroad. *Ex parte Moens*, 1 Mont. 15.

See PRACTICE, 1 Mont. 519, 520.

ALLOWANCE.

See ASSIGNEES.

1. On the bankruptcy of partners, a full allowance is payable to each. *Quere*. Whether allowance be before final dividend? *Ex parte Gibbs and Howard*, 1 Mont. 105.

2. The right to allowance does not apply to dividends declared before the 6 Geo. 4. c. 16. came into operation. *Anonymous*, 1 Mont. 10.

3. A partner is entitled to an allowance although his separate estate does not contribute to the joint estate so as to form the statutable amount for allowance. *Ex parte B. Morris*, 1 Mont. 505.

AMENDING COMMISSION.

See COMMISSION.

ANNUITY.

1. An annuity creditor, who has a policy of insurance as security,

cannot prove without a sale of the policy. *Ex parte Tierney*, 1 Mont. 78.

2. The general order does not authorize the commissioners to order a sale of an estate on which an annuity is charged, for payment of the value of the annuity. In the matter of *Delves*, 1 Mont. 492.

ANSWERING PETITIONS.

See PETITIONS, answering.

APPEAL.

The House of Lords will rectify an erroneous opinion of the Scotch courts with respect to the English law, founded on the opinion of counsel. *Douglas v. Brown*, 1 Mont. 75.

ARREST.

1. A bankrupt, when attending the commissioners, is protected from an arrest on a *capias ulagatum*. *Ex parte Helsby*. 1 Mont. 355. S. C. 1 Dea and Ch. 16.

2. A petitioning creditor who attends at the meeting for the choice of assignees, to proffer himself as an assignee, and to watch the proceedings, is protected. *Selby v. Hills*, 8 Bing. 166.

3. If a petitioning creditor entitled to protection is arrested, he may apply for his discharge to the Court out of which the process issued. *Selby v. Hills*, 8 Bing. 166.

4. A person redeundo may stop for reasonable refreshment. *Selby v. Hills*, 8 Bing. 168.

In bankruptcy, assets are always (with one exception) administered according to the rules of a Court of equity. *See D. Rose J., ex parte Moul*, 1 Mont. 345. S. P. 1 D. & C. 71.

ASSIGNEES.

ASSIGNEES.

General.

1. It has been said that the assignees derive all their rights from the petitioning creditor. *Tope v. Hoskin*, 7 B. & C. 101.

2. Assignees cannot delegate their general authority. *Douglass v. Brown*, 1 Mont. 93.

3. The official assignee is only a ministerial officer, and must pay dividend ordered. *Ex parte Alexander*, 1 Mont. 503.

Election of.

3. The Court will not permit either the solicitor to the commission, or his partner, to be assignee. *Ex parte Rice*, 1 Mont. 259.

4. If assignees are elected by the vote of the petitioning creditor before he has proved, the choice may be vacated, though the petition is presented six months after the election. *Ex parte Danby*, 1 Mont. 67.

5. A creditor on a voluntary bond is entitled to vote in the choice of assignees. *Ex parte Venables*, 1 Mont. 494.

6. A creditor who has proved is entitled to vote in the choice of assignees if he apply before the commissioner has signed the declaration of appointment. *Ex parte Nash*, 1 Mont. 501.

Assignment, Bargain and Sale to, &c.

7. When an assignee is removed, and a new assignee appointed, there is not any necessity for a new conveyance. *Ex parte Fuller*, 1 D. & C. 32.

8. If the provisional assignment is made to four persons, and three of the four, together with three other persons, are chosen assignees by the creditors; and, for the purpose of transferring from the four provi-

sional to the six chosen assignees, the four execute an assignment to the commissioners, to the intent that they may make a valid assignment to the six chosen assignees, and the commissioners accordingly execute such an assignment: such assignment is not effectual so as to pass choses in action from the four provisional assignees. *Moult v. Massey*, 1 B. & Ad. 648.

9. The Court will not order the bargain and sale from the commissioners to the assignees to be delivered to a purchaser, upon an allegation that it extends to no other property. *Ex parte Pocock*, 1 D. & C. 104.

Election as to Property.

10. If the assignees reject a lease, they cannot sue on any of the covenants. *Keirsey v. Carstairs*, 2 Barn. & Adol. 716.

11. If the assignees so act as to make the property of less value to the landlord, and as if the property were vested in them, it is said to be an election. *Carter v. Warne*, 4 C. & P. 193.

12. If a sale take place on the premises, of the stock in trade, and the house and shop fixtures, and the catalogue states that on the same day will be sold the valuable lease of the premises, with commanding shop, held for an unexpired term of 16 years from Lady-day preceding, at the low rent of 20*l.* per annum; and the catalogue describes the sale to be made without reserve, and contains a list of fixtures, some of them belonging to the landlord, and some put up by the bankrupt, and the lease is bought in, but all the fixtures are sold, and the premises much injured by their being taken down and carried away, it is a taking possession. *Carter v. Warne*, 4 C. & P. 193.

ASSIGNEES.

13. Assignees have a right to do reasonable acts, to ascertain the value of property. D. Tenterden, C.J., *Hope v. Booth*, 1 B. & Ad. 505.

14. If the assignee hold the lease from December to May, and put a person into possession with instructions to let the premises, and several applications are made by parties desirous to take them, but they remain unlet, and on the landlord's calling upon the assignee for payment of rent, he says he will pay it if he can make any thing by the house, and the jury find that this is only a conditional acceptance of the lease, and that he has not retained it an unreasonable time, the Court will not disturb the verdict. *Lindsey v. Limbert*, 12 B. M. 209.

PRACTICE, 1 Mont. 506.

Actions and Suits by and against.

15. Generally speaking, it is more favourable to the defendant that he should be sued in contract than in tort. *Young v. Marshal*, 8 Bing. 45.

16. A right of action for an injury to the *person* does not pass to the assignees, but for an injury to the bankrupt's *personal property*, they are entitled to sue. D. Park, J. *Hancock v. Caffin*, 8 Bing. 358.

17. Under the 6 Geo. 4. c. 16. s. 12 & 63. assignees may maintain an action for unliquidated damages which accrued before the bankruptcy by non-performance of a contract. *Wright v. Fairfield*, 2 Barn. & Adol. 727.

18. A delaration by assignees, as assignees of the bankrupt, for the amount of goods sold by the bankrupt, with an allegation, as a breach, "that the defendant has not paid the bankrupt or the plaintiff's assignees as aforesaid," instead of, "as assignees as aforesaid," is sufficient. *Cobbet v. Cockeraine*, 8 Bing. 17.

19. If a trader be the holder of a

bond and of a warrant of attorney, and a commission issue against him under which assignees are chosen, and judgment is signed after he has obtained his certificate, the judgment is properly entered. *Guinness v. Carroll*, 1 B. & Ad. 459.

20. If they accept the balance of amount, it is an affirmance, and they cannot maintain trover. *Bennett v. Spackman*, 1 C. & P. 274.

21. The plaintiff, assignee of a bankrupt, having died, and another assignee having been appointed in his stead, the rule to enter a suggestion of such death on the record, in pursuance of the statute 6 Geo. 4. c. 16. s. 67. is absolute in the first instance. *Westall v. Sturges*, 4 Moore & Payne, 217.

22. A new assignee may, under a suggestion upon the record, by virtue of section 67, continue an action commenced by his predecessor for a penalty. *Bates v. Sturgess*, 7 Bing. 583.

23. If a purchaser from a bankrupt know, from the circumstances under which the sale is made, that the seller means by it to get money for himself in fraud of his creditors, and that the sale is made for that purpose, the assignees are entitled to recover the property. *Ward v. Clarke*, 1 Moody & M. 499; and *Cook v. Caldecott*, 1 Moody & M. 525.

24. If a person, after notice of an act of bankruptcy, sets up a claim of lien upon certain deeds, and the bankrupt pay the sum he demands to get possession of the deeds, the assignees cannot question the amount of this lien, unless there be a count for money had and received to the use of the assignees; but if the person had no just claim, the assignees may recover back the sum in an action for money had and received to the use of the bankrupt; if, however, it appear that the defendant never received any money,

ASSIGNEES.

but that A., who was to have conveyed a house to the bankrupt at his desire, mortgaged it to the defendant, an action for money had and received will not lie. *Noble v. Kersey*, 4 C. & P. 124.

25. If a leaseholder underlet to N., by an agreement under seal to grant a lease when N. has paid 1,200*l.* for fixtures, &c., N. in the meantime paying a certain rent, and the leaseholder receive rent from N., but neglect to pay the superior landlord, who thereupon distrains on N., and N. becomes bankrupt, the damage to N. by this distress is a cause of action on which his assignees may sue the leaseholder. *Hancock v. Caffin*, 8 Bing. 358.

26. The assignees under a commission against an insurance broker may recover the amount of the premiums which the bankrupt had become liable to pay to the insurers, under a count which charges that the insured are indebted for premiums due to the bankrupt in respect of his having caused and procured to be under-written divers policies; but they are not entitled to recover such sums under the count for money paid, because the bankrupt has not actually paid the sums, or done any thing equivalent. *Power v. Butcher*, 10 B. & C. 329.

27. When the cause is called on and referred, the judge cannot certify under 6 Geo. 4. c. 16. s. 90. *Barthrop v. Anderton*, 8 Bing. 268.

28. If the assignees refuse to inquire into a fraudulent preference, the Court will order an inquiry before the commissioners, the creditor undertaking to pay the costs thereof. *Ex parte Billing*, 1 Dea. & Ch. 112.

29. Upon a petition to confirm a resolution of creditors, the Court will refer it to the commissioners to certify whether it is beneficial, unless it is with the consent of all the

creditors. *Ex parte Farmer*, 1 D. & C. 110.

30. A sheriff is protected against assignees by his official character and condition, and cannot be made answerable in any species of action, as a wrongdoer, by relation. *Balme v. Hutton*, 2 Tyr. 25. S.C. 1. C. & J. 19.

31. Query, Whether the sheriff is liable when he has sold and paid over without notice of the act of bankruptcy? *Young v. Marshall*, 8 Bing. 45.

32. If the sheriff sell under a *fi. fa.* without notice, till after the levy, of an act of bankruptcy, and pay the proceeds to the plaintiff, but without an indemnity, it is not settled whether assumpsit lies against the sheriff. *Young v. Marshall*, 8 Bing. 45.

33. If the sheriff sell under a *fi. fa.* without notice, till after the levy, of an act of bankruptcy, and pay the proceeds to the plaintiff upon an indemnity, the assignees may maintain assumpsit for money had and received against the sheriff. *Young v. Marshall*, 8 Bing. p. 45.

34. If a sheriff sell goods which he has seized after notice of an act of bankruptcy, and sell by bill of sale to the execution creditor, who sells to a stranger, and such stranger afterwards becomes one of the assignees under the commission, the assignees may maintain trover against the sheriff. *Vaughan v. Wilkins*, 1 B. & Ad. 370.

35. Assignees cannot maintain trover against a chief bailiff for goods seized and sold by him under a *fi. fa.* before the commission, but after an act of bankruptcy committed by the defendant, of which the bailiff had not notice; but they may against a deputy bailiff who has taken an indemnity from the judgment creditor. *Balme v. Hutton*, 2 Tyr. 17.

ASSIGNEES.

36. If, to prevent a sale of a bankrupt's goods under an execution, a creditor pay the sum to the sheriff, with notice to detain it, and after the appointment of assignees they pay the money to the creditor, they cannot maintain assumpsit against the sheriff. *Bucker v. Booth*, 1 Moody & M. 518.

37. Trover lies against the sheriff for goods seized by him after an act of bankruptcy, without notice, and his assenting to some of the goods being packed up and sent to him, to secure the payment of his poundage, is evidence of conversion. *Carlisle v. Easland*, 5 B. Moore, 102; S. C. 7 Bing. 298.

38. Query, Whether the Lord Chancellor has authority to direct a suit to be instituted by assignees without the previous consent of creditors? *Stokes v. Decy*, 1 Beaty, 152.

39. To a bill by the assignee of a bankrupt against a removed assignee, for an account, it is a good plea that the suit was not instituted with the consent of the creditors. *Stokes v. Decy*, 1828, 1 Beaty, 152.

40. The object of the legislature, in requiring the consent of creditors before an equity suit can be commenced, is to prevent the estate from being squandered in improvident Chancery suits, and is a wise provision. *Stokes v. Decy*, D. Sir A. Hart. 1 Beaty, 152.

41. There may be a distinction, as to the necessity for the consent of creditors, between an assignee commencing an original suit and continuing a suit commenced by the bankrupt. *Stokes v. Decy*, 1 Beaty, 152.

42. If a sole plaintiff become bankrupt, the bill will be dismissed without costs, unless the assignees file a supplemental bill within three weeks. *Sharp v. Hullet*, 2 Sim. & Stu. 496.

43. If a bankrupt is made a party in an equity suit after his bankruptcy, and he set up a claim in his answer, when it is manifest he has no interest, the bill as against the bankrupt will be dismissed with costs. *Bennett v. Lane*, 1 Tamlyn, 238.

Evidence in Actions.

44. Notice to read certain parts of the proceedings prevents other parts being read. Ex parte *Langley*, 1 Mont. 355.

45. A bankrupt who has been examined in chief to increase the fund, in an action by the assignees, cannot be cross-examined to any fact tending to defeat the commission. *Binns v. Tetley*, M'Cl. & Y. 397.

46. As to the principle of refusing to examine the bankrupt as to the requisite to support the commission. *Binns v. Tetley*, M'Cl. & Y. 404.

47. It is sufficient if an affidavit of debt, made by one of the assignees of the bankrupt, state that the defendant is indebted, &c., as appears by the books of the bankrupt, and as the deponent verily believes, without alleging that the books are in the deponent's possession. *Hatton v. Bristow*, 11 B. M. 504.

48. Evidence of acts of buying and selling, before the passing of 6 Geo. 4., are evidence to show a trading after the statute. *Worth v. Budd*, 2 B. & Ad. 176.

Costs.

49. When the assignees are defendants they are not entitled to double costs, nor is any defendant who is acting generally under the authority of the assignees, without a warrant from the commissioners, entitled to double costs. *Worth v. Budd* 2 B. & Ad. 176.

BANKRUPT.

Accounts.

50. If four persons are chosen assignees, and at the choice it is verbally agreed that one shall act, and notice is given to the banker to pay the drafts of that one, and a dividend is declared, and notice is given to the creditors, "that they may receive the dividend upon application to the assignees," and the acting assignee pay the dividend by checks which are dishonoured, he having overdrawn the account, and absconded: Held, the other three assignees are liable. *Ex parte Booth and Ingledew*, 1 Mont. 248.

51. Assignees are not entitled to travelling expences. *Ex parte Elsee*, 1 Mont. 1.

Charging 20l. per Cent.

52. The bankrupt cannot petition to charge his assignees with 20l. per cent. under the 16 Geo. 4. c. 16. sect. 104. not having any interest therein, either in respect to his right to surplus or allowance. *Ex parte Lowe*, 1 Mont. 392. S.C. 1 Dea. & Ch. 137.

53. *Quære*, Whether the charge of 20l. per cent. imposed by 6 Geo. 4. c. 16. sect. 104. be one gross charge of 20l. or an annual charge of 20l. per cent.? *Ex parte Lowe*, 1 Mont. 392. S.C. 1 Dea. & Ch. 137.

54. *Quære*, Whether the 104th section of 6 Geo. 4. c. 16. as to the charge of 20l. per cent. be retrospective? *Ex parte Lowe*, 1 Mont. 392. S.C. 1 Dea. & Ch. 137.

ASSIGNMENT OF BOND.

See BOND, Assignment of.

ATTESTATION.

See PETITION, Attestation of.

B.

BANKRUPT.

Section 17 of 1 & 2 Gul. 4. c. 56. does not prevent a bankrupt applying to supersede, though two months have elapsed from the date of the fiat. *Ex parte Palmer re Palmer*, 1 Mont.

BANKRUPT, UNCERTIFICATED.

1. Section 75 of 6 Geo. 4. c. 16. does not apply to a contract, in its nature not a lease, but for a purchase of property. *Hope v. Booth*, 1 B. & Ad. 505.

2. If a bankrupt rely on section 75 as a defence to an action of covenant by his lessor, he must plead specially facts to bring him within the section. *Ob. Dict.*, Parke, J., *Hope v. Booth*, 1 B. & Ad. 508. *Bayley v. Ballard*, 1 Camp. 416. *Qu.* If law? *Clock v. Rogers*, 7 Bing. 445.

3. The plaintiff, an uncertificated bankrupt, in order to try the validity of the commission issued against him, arrested his assignees upon an affidavit that they were indebted to him for money had and received to his use. The assignees having given bail to the sheriff, the Court ordered the bail bonds to be delivered up to be cancelled, on their entering a common appearance. *Chambers v. Bernasconi*, 4 Moore & Payne, 218.

BARRISTERS.

The Lord Chancellor has not jurisdiction in bankruptcy to interfere with the practice of a barrister as to retainers. *Ex parte Elsee*, 1 Mont. 69.

CERTIFICATE.

BOND, ASSIGNMENT OF.

When the petitioning creditor petitions to supersede, the bankrupt cannot petition for an assignment of the bond unless for malice. *Ex parte Sylvester*, 1 Mont. 125.

C.

CANAL SHARES.

See REPUTED OWNERSHIP.

CERTIFICATE.

Debts barred by.

1. A promise by a bankrupt to deliver goods, in satisfaction of a debt, seems not to be such a promise to pay the debt as will revive it after certificate. *Tattle v. Grimwood*, 11 B. M. 434.

2. A surety for a bankrupt is not discharged by the creditors signing the bankrupt's certificate after notice from the surety not to sign it. *Brown v. Carr*, 7 Bing. 508.

3. A discharged insolvent is not exonerated from the claim of a surety who pays subsequently to the discharge a debt due before the discharge. *Powell v. Eason*, 8 Bing. 23.

4. A discharged insolvent is not exonerated from the claim of a surety who pays subsequent to the discharge a debt due before the discharge, because, as it seems, a surety cannot, under such circumstances, claim under the insolvent debtors' act. *Powell v. Eason*, 8 Bing. 24.

5. A defendant, having been committed on an attachment for non-payment of the costs of an action pursuant to a rule of Court, became

bankrupt while in custody, and obtained his certificate. Held, he was entitled to be discharged. *Riley v. Byrne*, 2 Barn. & Adol. 779.

6. A bankrupt, who has assigned his property to his assignees under a French commission of bankrupt, cannot afterwards be sued in a court of justice in the British dominions by one of his creditors for a debt proved under it. *Quelin v. Moisson*, 1 Knapp, Priv. Co. Cases, 266. *Semble*, not even for a debt not proved under it. S. C.

7. The fact of a bankrupt having absconded, and having been condemned, whilst absent, to five years' imprisonment and hard labour for a fraudulent bankruptcy, does not give any further right to a creditor to sue him for a debt contracted before his bankruptcy. 1 Knapp, Priv. Co. Cas. 266.

8. The Court refused to decide on motion, whether the *cessio bonorum* would be an absolute discharge in Guernsey from a debt contracted in England, but held that it should be put on the record. *Whittingham v. De la Rieu*, 2 Ch. 53.

9. So upon the bankruptcy and certificate obtained in Bremen. *Earlier v. Largiste*, 2 Ch. 55.

10. A certificate of conformity, obtained under a commission of bankrupt in England, is a bar to an action for a debt contracted by the bankrupt at Calcutta previously to his bankruptcy, although the creditor had no notice of the commission, and was resident at Calcutta. *Edwards v. Ronald*, 1 Knapp's Priv. Coun. Cases, 259.

11. If the goods of a certificated bankrupt are taken in execution for debt which might have been proved under the commission, the Court, on motion, will set aside the execution, although it is stated on behalf of the creditor that the bankruptcy

CERTIFICATE.

is fraudulent and collusive, and although in an action by the assignees they were unable to prove the trading. *Barrow v. Poile*, 1 B. & A. 629.

12. If a person undertake, with A., to settle with certain bankers a balance due to them on an acceptance of A.'s, but he neglect to take up the bill, and he give to A. a new undertaking to deliver up to him his acceptance within a month, or give him a bond of indemnity, but does not perform either, and the banker sue A., and pending a rule for a new trial the person becomes bankrupt, the certificate is not a bar to a demand made by A. *Yallop v. Ebers*, 1 B. & Ad. 700.

13. If judgment, as in case of a nonsuit, is signed, and costs taxed, after the commission has issued, but so as to relate to a day anterior to the commission, they are not proveable, but the Court is bound to inquire on what day the judgment was actually signed. *Brough v. Hancock*, 7 Bing. 650.

14. If, upon the sale of an estate, the vendor covenant, that on payment of the purchase money he will grant, sell, &c., and the vendee covenant to pay the purchase money on or before a day certain, or whenever a good title should be tendered to him, and it is agreed that the vendee, on or before the day named for payment, may require the purchase money to remain a charge on the premises, so that upon the completion of the conveyance by the vendor the vendee should execute to him a proper mortgage for securing the purchase money, with interest, and the vendee covenant to pay the interest; but if the interest should be in arrear for thirty days, the vendee should be considered as a tenant to the vendor from the date thereof, at a yearly rent, with power to the vendor to

distrain as for rent reserved by lease, to the end that the interest and costs might be fully satisfied; and the vendee require the purchase money to remain a charge, and he is let into possession, and receive the rents; and the vendee become bankrupt, and half a year's interest being in arrear for more than thirty days, the vendor distrain on the tenants, and the assignees satisfy the distress; and the vendee obtain his certificate, and the vendor bring an action of covenant against the bankrupt to recover interest accrued subsequent to the certificate; the certificate is a bar. *Hope v. Booth*, 1 B. & A. 498.

General.

15. It is a moral obligation on a creditor to sign the certificate, when he is satisfied that the bankrupt has conformed to the provisions of the statute. *Brown v. Carr*, 7 Bing. 508.

16. A petition to stay a certificate, because the commission is concerted, does not lie. *Ex parte Smith*, 1 Mont. 10. See now 1 & 2 Gul. 4. c. 56. sect. 42.

17. A certificate, dated previous to the 6 Geo. 4. c. 16. need not be enrolled. *Tuttle v. Grimwood*, 11 B. M. 434.

18. A certificate obtained after 6 Geo. 4. c. 16. under a commission issued before that statute, is proved by the production of the certificate duly allowed. *Taylor v. Welsford*, 1 Moody & M. 503.

19. The certificate protects the goods as well as the person of the bankrupt from all debts proveable under the commission. *Davis v. Shapley*, 1 B. & Adol. 54.

20. If the goods of a certificated bankrupt, acquired after the bankruptcy, are seized under a *fi. fa.* issued upon a judgment, in respect of a debt due before the bank-

CERTIFICATE.

ruptcy, the Court will set aside the judgment on motion. *Davis v. Shapley*, 1 B. & Adol. 54.

21. If one of two defendants plead bankruptcy *puis darrein continuance*, the plaintiff cannot at N. P. confess this plea to be true, and go on as to the other defendant. *Pascall v. Horseley*, 3 C. & P. 372.

22. Practice as to attesting. *Practice*, 1 Mont. 508.

23. Creditor paid expunged. *Practice*, 1 Mont. 508.

Mode of obtaining Discharge.

24. By the words of s. 127. the certificate is only made evidence of the fact of issuing the commission, &c., leaving untouched the question of its validity or of its effect, and the manner and place in which that question may be decided. *Fowler v. Coster*, 10 B. & C. 430.

25. If the goods of a certificated bankrupt are taken in execution, it seems that the Court will not set it aside on motion, if it appear that it may be void by gaming or other misconduct of the bankrupt, specified in s. 130. *D. Barrow v. Poile*, 1 B. & A. 633.

26. If a plea of certificate *puis darrien continuance*, when pleaded in Court to prevent judgment of failure of record, is supported only by an insufficient affidavit, it seems that it cannot be amended. *Smith v. Witham*, M'Cl. & Y. 350.

27. A plea of certificate *puis darrien continuance* may be pleaded in Court, in order to prevent judgment of failure of record. *Sharp v. Witham*, M'Cl. & Y. 350.

28. A plea of certificate *puis darrien continuance*, particularly setting forth all the matters relating to the bankruptcy, is sufficiently verified by affidavit, "that to the best of his belief the plea is, so far as relates to the commission, proceedings, and

certificate, true in substance and fact." *Sharp v. Witham*, M'Cl. & Y. 350.

29. A plea of plaintiff's bankruptcy must state the trading, and all the particulars necessary to lead to the issuing of a commission, and aver that the party was positively a bankrupt. A plea, therefore, only alleging the commission under which he was duly found and adjudged a bankrupt, held insufficient. *Guinness v. Carroll*, 2 M. & Ry. 132.

30. If, in an action on a bail-bond against three defendants jointly, one of them pleaded his bankruptcy and certificate in bar, upon which the plaintiff entered a *nolle prosequi* as to him, and filed a replication as to the two others, and the plaintiffs had notice of the bankruptcy of the one before plea pleaded, the bankrupt is not entitled to his costs, under the statute 8 Eliz. c. 2. s. 2. *Booth v. Middlecoat*, 4 Moore & Payne, 182.

See DEBT PROVEABLE. DISCHARGE.

CHOSE IN ACTION.

See PROVISIONAL ASSIGNMENT.

COMMISSION.

See FIAT.

Description in.

1. It is not necessary that the particular species of trading should be set forth in the commission; and a commission would be as good, if, instead of calling them bankers, the bankrupt had been described as esquires or gentlemen. *D. Tenderden, C. J., Bernasconi v. Farrowbrother*, 10 B. & C. 554.

COMMISSIONERS.

2. If the bankrupt is described in the commission as "banker, being a trader according to the statute," and the business of banker had ceased before the 6 Geo. 4., the word banker is descriptive of the person only, and the commission may be supported by evidence of any trading. *Bernasconi v. Farebrother*, 10 B. & C. 549.

3. In the commission the bankrupt must be described of the place where he is generally known. *Ex parte Shadbolt*, 1 Mont. 89.

Against Uncertificated Bankrupt.

4. A commission against an uncertificated bankrupt cannot be supported upon the ground that he is reputed owner of property by consent of the assignee under the first commission. *Nelson v. Cherrell*, 7 Bing. 663.

5. A commission against an uncertificated bankrupt is void of law. *Nelson v. Cherrell*, 7 Bing. 663.

Amending.

6. A commission cannot be amended after it is opened. *Re Stephenson*, 1 Mont. 116.

Country.

7. Leave must be obtained to issue a country commission against a London trader. *Ex parte Hill*, 1 Mont. 260.

General.

8. A commission ordered at a private seal will, in the vacation, be preferred. *Ex parte Atkinson*, 1 Mont. 137.

Second.

See SUPERSEDEAS.

COMMISSIONERS.

1. The solicitor for a judgment creditor should not act as commissioner. *Ex parte Shum*, 1 Mont. 454.

Commitment by.

2. The authority of commissioners to commit depends upon a particular act of parliament, to which they must adhere. *Isaacs v. Impey*, 4 C. & P. 113.

3. The authority of commissioners to commit depends entirely on the act of parliament, which enables them to commit, first, for a refusal to answer lawful questions respecting the bankrupt's estate; and, secondly, for a refusal to produce books. D. Lord Tenterden. *Isaac v. Impey*, 10 B. & C. 444.

4. The commissioners cannot require a person under examination to read entries in a book which he produces. *Isaac v. Impey*, 10 B. & C. 442.

5. If the commissioners commit for refusing to answer, because the witness refuses to read an entry in a book, they are liable to an action, although their only motive is a wish to discharge their duty. *Isaac v. Impey*, 4 C. & P. 120.

6. The commissioners may compel the production of a book, to enable them to read the entries. D. Bayley, J. *Isaac v. Impey*, 10 B. & C. 444.

7. The warrant need not state that the questions related to the bankrupt's person, trade, &c., or that they were lawful questions, as it is sufficient if, upon the examinations, they appear so to be. *Ex parte Harrison*, 1 B. & Adol. 410.

8. On the bankruptcy of the mortgager, the commissioners may compel the mortgager to produce his mortgage deeds. *Ex parte Caldecott*, 1 Mont. 55.

9. Rule as to the examination of the executor of a creditor before the commissioners. *Ex parte Solarte re Alzedo*, 1 Mont.

See SURRENDER.

CONTINGENT DEBT.

10. If the usual four-day order to pay money or stand committed is served, but no demand made, and the party is committed, the Court will discharge the commitment with costs. *Ex parte Dicas*, 1 Mont. 215.

See COMMISSIONERS, *Commitment by*.
HABEAS CORPUS. EXAMINATION.

CONCERTED COMMISSION.

A petition to stay a certificate because the commission is concerted does not lie. *Ex parte Smith*, 1 Mont. 10. See now 1 & 2. *Gul.* 4. c. 56. sect. 42.

CONSTRUCTION OF DEEDS.

A deed may be construed according to the intent of the parties, collected from its recitals and provisions. *Lester v. Garland*, 1 Mont. 2.

CONTINGENT DEBT.

1. If a person undertake with A. to settle with certain bankers a balance due to them on acceptance of A.'s, but he neglect to take up the bill, and give to A. a new undertaking to deliver up to him his acceptance within a month, or give him a bond of indemnity, but does not perform either, and the banker sue A.; and, pending a rule for a new trial, the person become bankrupt, the certificate is not a bar to a demand by A. *Yallop v. Ebers*, 1 B. & Ad. 700.

2. Contingent debts are not proveable if the contingency be remote. *Ex parte Davis*, 1 Mont. 121.

3. Where the contingency depends on the separation of husband and wife, and of a widow's not marrying again, it is not within sect. 56 of 6 Geo. 3. c. 16. *Ex parte Davis*, 1 Mont. 297.

4. By marriage settlement S. covenanted with trustees to cause 4,000*l.* to be paid to them within twelve months after his decease, in trust to pay the interest to the wife for life, if she survived, and after her death the principal to be divided amongst the children; if no children, to the survivor of them, (S. and his wife,) his or her executors or administrators. Held, this was such a contingent debt as was proveable under a commission against S. *Ex parte Tindall*, 1 Mont. 375. 462. S.C. 8 Bing. 402.

COSTS:

Taxation of.

1. A creditor may petition to refer the solicitor's bill up to the choice of assignees to the master for re-taxation, without stating in his petition items to which he objects, as settled by the commissioners. *Ex parte Key*, 1 Mont. 133.

2. Upon a petition by a creditor under 6 Geo. 4. c. 16. s. 14. to re-tax a solicitor's bill, it is not necessary to serve the assignees. *Ex parte Payne*, 1 Mont. 455.

3. A petition to tax a solicitor's bill must be served. *Ex parte Griffith*, 1 D. & C. 41. But see *ex parte Payne*, 1 Mont. 455.

4. An assignee who is not a creditor may petition to tax a solicitor's bill of costs, as it seems, under 6 Geo. 4. c. 16. s. 14. *Ex parte Barlow*, 1 Mont. 89.

5. If the assignees neglect to have a solicitor's bill of costs taxed

DEBT PROVEABLE.

by the commissioners, the bankrupt may, after having settled with the creditors, apply to the general jurisdiction of the Court, and obtain an order to tax. *Ex parte Bayley*, 1 Mont. 208.

Of Mortgages.

6. An equitable mortgagee who applies for a sale will not be allowed the costs of an action at law brought for the mortgage money. *Ex parte Fletcher*, 1 Mont. 454.

7. The costs of an application by an equitable mortgagee for leave to bid, the assignees consenting, may be paid out of the estate. *Ex parte Say*, 1 Mont. 364. S. C. 1 D. & C. 52.

8. If deeds relating to both freeholds and leaseholds are deposited, but the memorandum accompanying the deposit relate to the leaseholds only, the equitable mortgagee applying for a sale of both freeholds and leaseholds must pay the costs of the sale. *Ex parte Robinson*, 1 Dea. & Ch. 119.

9. The costs of the application by a legal mortgagee to bid at the sale are payable out of proceeds of the sale, if the assignees have the conduct of the sale. *Ex parte Brown*, 1 D. & C. 34.

General.

10. In general, costs cannot be allowed on a petition not praying costs. *Ex parte Daintry*, 1 Mont. 7.

11. If, upon a petition to except to taxation which does not pray costs an order to re-tax is made, the petition praying confirmation of the certificate of re-taxation may pray the costs of the original petition. *Ex parte Spurr*, 1 Mont. 6.

12. A petition is not necessarily dismissed with costs because two petitions, having the same object, have been dismissed, such dismis-

sals having been on matters of form. *Ex parte Hooper*, 1 Dea. & Ch. 117.

13. Where a petition to prove is not necessary, the petitioner must pay the costs. See *ex parte Rodgers*, 1 Dea. & Ch. 38.

14. Whether, if a clerk to a solicitor make an affidavit containing scandalous matter, costs of a reference to the master can be ordered against the clerk — *quære?* *Ex parte Kirby and Nias*, 1 Mont. 68.

15. The Court, on ordering a new trial as to the validity of a commission, may restrain proceeding for double costs under 6 Geo. 4. c. 16. s. 44. *Ex parte Eager*, 1 Mont. 85.

16. On a petition for payment of a dividend, unsuccessfully opposed by the assignees, interest at 5l. per cent. and costs are of course against the assignees; but if they acted *bona fide*, they may reimburse themselves out of the estate. *Ex parte Harrison*, 1 Mont. 250.

17. If in the Court of Review a petition is ordered to stand over on payment of the costs of the day, the objection to the cause being heard till the costs are paid cannot be made unless the order is drawn up. *Ex parte Clarke*, 1 Mont. 503.

See SOLICITOR. DEBT PROVEABLE.

D.

DEBT PROVEABLE.

1. A defendant having been committed on an attachment for non-payment of the costs of an action, pursuant to a rule of Court, became bankrupt while in custody, and obtained his certificate. Held, he was entitled to be discharged. *Riley v. Byrne*, 2 Barn. & Adol. 779.

2. A creditor who proved under

DEBT PROVEABLE.

a commission in 1816 cannot sue at law after the 6 Geo. 4. c. 16., which repeals the 49 Geo. 3. c. 141. *Adames v. Bridger*, 8 Bing. 314.

3. A debt on letters in the nature of a marriage settlement is proveable. *Ex parte Sitger*, 1 Mont. 100.

4. A debt in consideration of marriage is not proveable without a memorandum in writing. *Ex parte Barter*, 1 Mont. 135.

Double Proof.

5. B. and G. are partners at Manchester under firm of B. and Co. G. also trades separately at Stockport as G. and Co. G. likewise is partner with J. in London, under firm of J. and Co. B. and Co. draw bills on J. and Co., payable to the order of B. and Co., which J. and Co. accept, and which are then indorsed by B. and Co., G. and Co., and one S. R., and come into the hands of W. and Co. for a valuable consideration, without knowledge that G. was a partner in the firm of B. and Co. or of J. and Co., B. G. and J. become bankrupt. On the question whether W. and Co. could prove against the joint estate of B. and G., and also against the separate estate of G., or whether they must elect, the Court were equally divided; but the whole Court held, that the amount of dividends declared, but not actually received, by W. and Co. under J.'s commission, must be deducted from such proof. *Ex parte Moul*, 1 Mont. 321. S. C. 1 Dea. & Ch. 44.

Separate.

6. An insolvent who has applied to take the benefit of the act is not insolvent within the rule, that a proof cannot be made against the separate estate if there be a solvent partner. *Ex parte Morris*, 1 Mont. 218.

Proof against Separate or Joint Estate.

7. A. B. and C., being bankers in partnership, were appointed treasurers of a corporate body, and executed a joint and several bond, with a penalty of 20,000*l.*, conditioned for the due performance by them of various duties as treasurers, and especially that they would, "when thereunto required by the said company," &c. pay all balances in their hands, &c. A commission issued against A. B. and C., who had at the time a large balance in their hands as treasurers; but no demand under the bond having been made by the company before the bankruptcy: Held, there was not a sufficient breach of the condition to constitute a debt proveable under the separate estates of the bankrupts. *Ex parte Lancaster Canal Company*, 1 Mont. 27.

8. A separate creditor of one partner, who has a separate mortgage from the other partner, must prove his whole debt against his principal debtor, without a previous sale of the security. *Ex parte Rodgers*, 1 D. & C. 38.

9. Where parties, being indebted jointly, covenant jointly and severally to pay on demand, no demand is necessary to entitle the creditor to proceed severally against the covenantors; but where it was expressly stipulated by three partners, that until demand was made an existing debt should remain a joint debt, and no demand was made previously to the bankruptcy: Held, that the debt was proveable against the joint but not the separate estate of the three. *Ex parte Fairlie*, 1 Mont. 17.

10. Where one member of a firm, who carries on business on his separate account, supplies goods to the firm, and a commission issues against the firm, the debt is proveable; but

EQUITABLE MORTGAGE.

not so for money advanced. Ex parte *Cook*, 1 Mont. 228.

See CERTIFICATE. PROOF.

DISCHARGE.

1. If a certificated bankrupt apply before judgment for a discharge, the Court will, if he has occasioned vexatious delay, order him to pay the costs attendant upon such delay. *Sadler v. Cleaver*, 7 Bing. 771.

2. The Court may discharge a certificated bankrupt before judgment. *Sadler v. Cleaver*, 7 Bing. 769.

DESCRIPTION OF BANKRUPT.

See COMMISSION, *Description in*.

DIVIDEND.

If three commissioners are not present when an order of dividend is made, it is invalid. Ex parte *Day and Cooper*, 1 Mont. 212.

See ASSIGNEE, 3.

DOCKET.

1. At the commencement of the new Court in bankruptcy, the docket papers, instead of applying for a fiat, applied for a commission. This was adjudged not to be such an irregularity as to entitle the second docket to have the priority. Ex parte *Lechmere*, 1 D. & C. 1. S. C. 1 Mont. 510.

2. An affidavit not sworn before the solicitor to the petitioning creditor preferred where there were two dockets. *Anonymous*, 1 Mont. 136.

3. Docket on an affidavit sworn

in Ireland refused. *Anonymous*, 1 Mont. 137.

4. If two dockets are struck, one omitting to state that the bankrupt traded in London, and the other giving a perfect description, the Court will prefer the latter, the majority of the trade and creditors being in the country where both commissions were intended to be worked. Ex parte *Hill*, 1 Mont. 260.

Amendment of PRACTICE, 1 Mont. 509.

DORMANT PARTNER.

See REPUTED OWNERSHIP.

E.

ENROLMENT.

1. If the assignee is not bound, in an action where he is plaintiff, to produce the assignment, as he proves his title *aliunde*, there is no necessity to show the enrolment. *Bates v. Sturges*, 7 Bing. 586.

2. It is unnecessary to enrol a provisional assignment when the title appears in the general assignment. Ex parte *Martin*, 1 Mont. 84. S. P. *Bates v. Sturges*, 5 B. M. 568.

EQUITABLE MORTGAGE.

If deeds relating to both freeholds and leaseholds are deposited, but the memorandum accompanying the deposit refers to the leaseholds only, yet the mortgagee may pray a sale of both freeholds and leaseholds. Ex parte *Robinson*, 1 Dea. & Ch. 119.

See COSTS of Mortgagee.

EVIDENCE.

EVIDENCE.

Generally.

1. If, as a defence to an action by assignees, the defendant rely on the bankrupt being uncertificated under a former commission, he must give express evidence that the bankrupt's effects were assigned under such commission. *Phillips v. Hopwood*, 1 B. & Ad. 619.

2. In an action by assignees, under a commission against an uncertificated bankrupt, the defendant may give in evidence the existence of the previous commission; that under such commission his effects were assigned, and the bankrupt uncertificated, without notice to dispute any of the requisites; which is an answer to the action. *Phillips v. Hopwood*, 1 B. & Ad. 619.

3. A party omitting to give notice to dispute the requisites admits them, but not the effect of the commission in point of law. *Phillips v. Hopwood*, 1 B. & Ad. 321.

4. Where it is immaterial whether the action is brought by the bankrupt or his assignees, the proceedings are evidence of the requisites, although notice is given to dispute. D. Patterson, J., *Smith v. Woodward*, 4 C. & P. 542.

5. In an action of detinue by the assignees, and no demand made by the bankrupt before the bankruptcy, and notice is given to dispute the requisites, the proceedings are sufficient evidence. D. Patterson, J., *Smith v. Woodward*, 4 C. & P. 541.

6. The only cases in which the assignees are to be put to strict proof of the bankruptcy are those in which the bankruptcy is almost a part of the cause of action, such as cases of preference. D. Patterson, J., *Smith v. Woodward*, 4 C. & P. 542.

7. In an action by the assignees,

where part of the claim might have been recovered by the bankrupt, and part not, and the assignees rely upon the proceedings as evidence of the requisites, they must elect to go for that part which the bankrupt might have recovered. *Gibson v. Oldfield*, 4 C. & P. 314.

8. If the defendant does not give notice to dispute the requisites to support the commission, it is unsettled whether the assignees can invalidate, by relation to an act of bankruptcy, without proving a petitioning creditor's debt before the act of bankruptcy. *Norman v. Booth*, 8 B. & C. 703. Lord Tenderden & Parke, J.; *contra*, Justices Bailey & Littledale.

9. If, in an action against the sheriff, the defendant do not give notice to dispute the requisites to support the commission, and the assignees give evidence of an act of bankruptcy committed between the sale and issuing the commission, it seems that they must prove the petitioning creditor's debt before the act of bankruptcy. *Norman v. Booth*, 10 B. & C. 705.

10. A written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer at the time of the caption, and sent by him immediately to the sheriff's office, and there filed in the course of business, is not, after the death of the officer, evidence of the place of arrest in an action between a bankrupt and his assignees. *Chambers v. Bernasconi*, 1 Tyr. 335.

11. If the messenger show his warrant to a person supposed to be in possession of bacon, the property of the bankrupt, and demand the bacon, and the person says, "I have it not; I have some that came from a shop in Exeter" (which was that of the son and daughter of the bankrupt); and the messenger desire him

EVIDENCE.

to take care of it, and not to part with it, as more would be heard about it, and he afterwards suffer it to be removed; this is a conversion. *Haikes v. Dunn*, 1 Tyr. 413.

12. When assignees sue for a debt due before the bankruptcy, and have notice that the requisites will be disputed, the only costs to which the assignees will be entitled are the costs of producing the depositions. *Ralpho v. Dawes*, 3 C. & P. 362.

13. If, in an action of trover by assignees, the defendant's attorney admit that the party was *duly declared* bankrupt, and the defendant do not give notice to dispute, he is precluded from objecting to any of the requisites to support the commission. *Perring v. Tucker*, 3 Moore & P. 558.

14. If notice to dispute is given by the plaintiff after issue joined, but it is alleged that the defendant's attorney said, "It is of no consequence—the notice is sufficient—it will do very well," the fact cannot be examined at *Nisi Prius*. *Folks v. Scudder*, 3 C. & P. 232.

15. The depositions are conclusive evidence, so as not to admit evidence of fraud in the concoction of any of the requisites to support the commission. *Young v. Timmins*, 1 Tyr. 15.

16. If it be necessary to prove a good petitioning creditor's debt on the 20th of May, it is not sufficient to show that on the 29th of January 700*l.* was due, and that there had been subsequent receipts and payments to an uncertain amount. *Gresley v. Price*, 2 Car. & P. 48.

Of particular Persons.

17. A bankrupt cannot be cross-examined to defeat the commission. *Sayer v. Garnet*, 7 Bing. 103.

18. The bankrupt cannot be called

to explain an act upon which the assignees rely as an act of bankruptcy. *Sayer v. Garnet*, 7 Bing. 103.

19. An insolvent debtor is not a competent witness for the plaintiff in an action by his assignee. *De-la-field v. Freeman*, 4 Car. & P. 67.

20. To enable a creditor to use the evidence of the bankrupt, which would eventually give the creditor a right to prove, a general release from the creditor to the bankrupt is not sufficient; the creditor must also release to the assignees all his claim on the bankrupt's *estate*, and the bankrupt must release all his claim to the surplus. *Perryman v. Steggal*, 8 Bing. 369.

21. Query, Whether the petitioning creditor is a competent witness in an indictment against the bankrupt for concealment? *R. v. Walters*, 5 Carr. & P. 140.

22. Witnesses examined after bankruptcy are not evidence against the assignees. *Hitchins v. Congreve*, 1 Mont. 225.

See EXAMINATION.

EXAMINATION.

The examination of a third person by commissioners is not evidence for the formation of their judgment, but merely a brief to interrogate the witness. *Re Goodwin*, 1 Mont. 304.

2. Of Witness Practice, 1 Mont. 506.

F.

FELONY.

A bankrupt who is in prison for debt does not commit felony by non-surrender. *R. v. Mitchell*, 4 C. & P. 251.

HABEAS CORPUS.

FIAT.

See COMMISSION.

Amending.

1. A fiat cannot be amended after it has been opened. *Ex parte Todd*, 1 Mont. 455.

See PRACTICE, 1 Mont. 510.

Opening.

2. Distance of eighty miles (eighty-five according to Messrs. Deacon and Chitty) is not alone a cause for non-attendance of the petitioning creditors. *Ex parte Cox*, 1 Mont. 390. S. C. 1 Dea. & Ch. 205.

3. The Court will not enlarge the time for opening a fiat on the petition of the petitioning creditor, who applies on the ground that, negotiations having been pending for a composition, he is not prepared with evidence of the trading, &c. *Ex parte Dawson & Earle*, 1 Dea. & Ch. 111.

See PRACTICE, 1 Mont. 511, 512.

FIXTURES.

See REPUTED OWNERSHIPS.

FRAUDULENT CONVEYANCE.

An assignment of property, with notice of an act of bankruptcy, is not protected by 21 Jac. 1. c. 19. s. 14. by a lapse of five years. *Mountford v. Ponten*, 1 Mont. 79.

H.

HABEAS CORPUS.

1. The bankrupt was committed. He refused to sign his examination,

for which he was committed. The warrant did not set out the examination. It concluded,—Detain him until he should full answer make to the satisfaction of the commissioners, and sign his examination.

The question was, whether, as he was committed only for not signing, the conclusion that he should be detained until *he should full answer make*, which was admitted to be defective, was defective in substance or only in form. All the Court was of opinion that it was only form. But note, that upon an application to the Court of K. B., the whole Court thought it a substantial objection. 9 B. & C. 234.

2. The bankrupt had been examined, and refused to sign his examination. He was committed. The warrant did not set out the examination, and concluded that he should be detained "*until he should full answer make to their satisfaction to such questions as should be put to him, and sign and subscribe such examination.*"

Upon a rule to show cause why a Habeas Corpus should not issue; Garrow, Hullock, and Vaughan, Barons, were all of opinion that the conclusion of the warrant was defective, not in substance, but only in form. Garrow and Hullock, Barons, thought the warrant was not defective from omission to set out the examination; but Vaughan, Baron, thought that from the omission to set out the examination it was defective.

It was therefore determined that the prisoner was not entitled to his discharge. In re *Leake*, 1829, 3 Y. & J. 46.

3. The power of the commitment is a formidable power, conferred upon the commissioners with a view to obtain an impartial distribution of the bankrupt's estate; but, being

HABEAS CORPUS.

a formidable power, and one directed to the liberty of the subject, all agree that it must be construed strictly. D. Vaughan, B. *Re Leake*, 3 Y. & J. 55.

4. All the Judges were of opinion that it was not necessary to set out the examination; and they were also all of opinion that the conclusion of the warrant was defective in substance, and that the prisoner was entitled to his discharge.

But note, that all the Judges of the King's Bench thought the conclusion substantially bad. *Ex parte Leake*, H. T. 1829. 9 B. & C. 234. 3 Y. & J. 58. in note.

I.

IMPERTINENCE.

Order 12 of the new orders in Chancery (concerning reference for scandal and impertinence) does not apply in cases in bankruptcy. *Ex parte Chester*, 1 Mont. 17.

INDICTMENT.

An indictment for perjury in an affidavit in bankruptcy may be sustained, although the affidavit cannot, by the practice of the office, be used, for defect in the *jurat*, the perjury being complete at the time the affidavit is sworn. *R. v. Hailey*, 1 Ry. & M. (N.P.) 96.

INTEREST.

Section 132 of 6 Geo. 4. c. 16., as to payment of interest, is not retrospective. *Ex parte Sammon*, 1 Mont. 253.

J.

JUDGMENTS.

No judgment signed or execution issued on a *cognovit actionem*, after declaration filed in a *bond fide* action, shall be deemed within the provision of 6 Geo. 4. c. 16. s. 108. 1 Gul. 4. c. 7. s. 7. 1 Mont. 151.

JURISDICTION.

Lord Chancellor's.

The Chancellor has no Jurisdiction to hear an original petition in bankruptcy. *Ex parte Lowe*, 1 D. & C. 30.

2. The Chancellor has not jurisdiction in bankruptcy to interfere with the practice of a barrister as to a retainer. *Ex parte Elsee*, 1 Mont. 69.

Of Court of Review.

1. If a petition of appeal be presented to the L. C. from a decision of the V. C. before the 1 & 2 Gul. 4. c. 56., the Court of Review has jurisdiction to hear the appeal, provided the appellant present a *fresh* petition of appeal to the Court of Review. *Ex parte Lowe*, 1 Dea. & Ch. 79.

2. The Court of Review has not jurisdiction to hear a petition addressed to the Lord Chancellor. *Re Appling*, 1 Dea. & Ch. 1. But see *orders in bankruptcy of 16th January 1832*.

See PRACTICE, 1 Mont. 512, 513.

JUDGE'S NOTES.

An application for the Judge's notes, on a petition for a new trial, is a motion of course. *Ex parte Harwood*, 1 Mont. 8.

LIEN AND EQUITABLE MORTGAGE.

L.

LIEN AND EQUITABLE MORTGAGE.

1. The assignment under the insolvent act passes to the assignee only what the insolvent was entitled to at law and in equity; and where an insolvent had deposited title-deeds as security, previous to his discharge, and gave a verbal authority to the mortgagee to receive the rents, the assignee could not recover from the creditor the rent he received after the insolvent's discharge. *Garry v. Sharratt*, 10 B. & C. 716.

2. The deposit of title-deeds is a sufficient authority to the mortgagee to receive the rents. *Garry v. Sharratt*, 10 B. & C. 717.

3. Rents and Profits received by an equitable mortgagee cannot be recovered from him. *Sumpter v. Cooper*, 2 B. & Ad. 223.

4. 7 Ann. c.20. s. 1., as to registry deeds, does not extend to equitable mortgages. *Sumpter v. Cooper*, 2 B. & Ad. 225.

5. The indorsee of a bill has a lien upon property deposited with the drawee as a security. *Ex parte Perfect*, 1 Mont. 25.

M.

MALICIOUS COMMISSION.

See SUPERSEDEAS, 17.

MORTGAGE.

1. An unpaid vendor is entitled to proceed as a mortgagee. *Hope v. Booth*, 1 B. & Ad. 498.

2. If a trader, having real estates under mortgage, becomes bankrupt,

and the whole interest in the estates are sold by the assignees for the benefit of the creditors, without any concurrence by the mortgagees, no auction duty is payable. *A. G. v. Winstanley*, 2 D. & C. 308.

3. If a trader having estates in mortgage conveys them to trustees, and then becomes bankrupt, and the whole interest in the estates is sold by the assignees, with the concurrence of the trustees, but it does not appear that the mortgagees are consulted, no auction duty is payable. *A. G. v. Winstanley*, 2 D. & C. 308.

4. On the bankruptcy of the mortgagor, the commissioners may compel the mortgagee to produce his mortgage deeds. *Ex parte Caldecott*, 1 Mont. 55.

5. The costs of the application of a mortgagee to bid at the sale may, if the assignees do not oppose, be paid out of the estate. *Ex parte Say*, 1 Mont. 364. S. C. 1 D. & C. 32. See *ex parte Williams*, 1 Mont. 513.

See PRACTICE, 1 Mont. 514, 515.

See REPUTED OWNERSHIP, 3,

MOTIONS.

An application for the judge's notes on a petition for a new trial is a motion of course. *Ex parte Harwood*, 1 Mont. 8.

MULTIFARIOUSNESS.

1. A petition for leave to prove presented by many creditors is not multifarious, if they have one common object. *Ex parte Bousfield*, 1 Mont. 128.

2. One petition by several creditors for leave to prove, and to re-

PARTNERSHIP.

move assignees, is not multifarious. if they have a common object. Ex parte *Howell*, 1 Mont. 129.

N.

NEW PROMISE.

1. When there is a conditional promise there must be a special count, stating the bankruptcy and subsequent promise to pay; but not so when the promise is absolute. *Lacy v. Mackenzie*, 4 C. & P. 464.

2. "By the end of next month I shall have my banker's account here, and I shall remit the sum due to you by a draft on them," seems to be an absolute promise. *Lacy v. Mackenzie*, 4 C. & P. 464.

3. If the bankrupt write to a creditor, and say, "By the end of next month I shall have my banker's account, and I shall remit the sum due to you in a draft on them," it has been ruled that this is a sufficient promise to answer a plea of the statute of limitations and of bankruptcy. *Lacy v. Mackenzie*, 4 C. & P. 463.

O.

OFFICIAL ASSIGNEE.

See ASSIGNEE.

OPENING COMMISSION.

1. When the time for opening the commission has expired, through the contrivance of the bankrupt, by his keeping a witness out of the way, the Court will permit the same. Petitioning creditor to issue a new fiat. In re *Mathews*, 1 D. & C. 35.

2. Under special circumstances the time for opening a fiat may be enlarged; but such applications are

not of course, and ought not to be encouraged, as the petitioning creditor ought always to be ready to open the commission at the proper time. The absence of a witness has been considered a sufficient cause. Ex parte *Moody*, 1 D. & C. 34.

See FIAT, Opening, 3.

OPENING DIVIDEND.

See DIVIDEND.

ORDER AND DISPOSITION.

Ex parte *Horwood*, 1 Mont. & Mac. 169, is confirmed on appeal by ex parte *Hencliffe*, 1 Mont. 24.

See REPUTED OWNERSHIP.

ORDERS.

Mode of enforcing those of V. C. See PRACTICE, 1 Mont. 513.

P.

PARTNERSHIP.

1. If, upon an execution levied before any act of bankruptcy, the money is paid to the sheriff between the times of committing the acts of bankruptcy by two members of a firm, the assignees under a joint commission are not entitled to the proceeds. *Morland v. Pellatt*, 8 B. & C. 725.

2. The assignees can obtain no share of the partnership effects until they first satisfy all that is due from the bankrupt partner to the partnership. D. Lord Tenterden. See also D. Bayley, J., *Holderness v. Shacks*, 8 B. & C. 618.

PETITIONS.

3. D. Lord Tenderden in *Smith v. De Silva*, and in *Holderness v. Shackels*, 8 B. & C. 618. *Smith v. De Silva* may have been very properly decided, without breaking in on the general principle. It is a very entangled case, and the facts stated in the report are not very clear and perspicuous.

4. If one of two attorneys, partners, is bankrupt, the Court will not, on motion, order the assignees to deliver the papers of the clients to the solvent partner, without the clients' consent. *Davidson v. Napier*, 1 Sim. 297.

5. Section 62 of 6 Geo. 4. c. 16. only applies to a partnership subsisting at the time of the bankruptcy. *Ex parte Morris*, 1 Mont. 218.

See ALLOWANCE. PROOF. REPUTED OWNERSHIP. SURPLUS.

PERJURY.

See INDICTMENT.

PETITIONING CREDITOR.

1. If, at opening the commission, the petitioning creditor prove his debt upon two bills of exchange for 50*l.* and 70*l.*, the consideration of which is goods sold to the bankrupt, and at the first public meeting the debt is proved, and the two bills produced, after which one of the bills is lost, the validity of the petitioning creditor's debt is not affected. *Pooley v. Milard*, 1 Tyrwhitt, p. 334.

2. If the course of dealing between the parties raises the presumption that the petitioning creditor received the bill before the act of Bankruptcy, it is *prima facie* sufficient. *Cowie v. Harris*, 1 Moody & M. 141.

3. It has been ruled that if there is a good petitioning creditor's debt at the time of the act of bankruptcy, after which payments are made and credits given, but there is 100*l.* due, and if the payments made are applied in order of time, they will be sufficient to discharge the balance due at the time of the act of bankruptcy, there is a good petitioning creditor's debt. *Shaw v. Harvey*, 1 Moody & M. 526.

4. An equitable debt is not a good petitioning creditor's debt. *Ex parte Hawthorne*, 1 Mont. 132.

See OPENING COMMISSION.

PETITIONS.

1. A petition to stay a certificate, because the commission is concerted, does not lie. *Ex parte Smith*, 1 Mont. 10. See 1 & 2 Gul. 4. c. 56. s. 42.

Answering.

2. In cases of emergency, a petition may be answered *instante*. *Ex parte Moody*, 1 D. & C. 34. In re *Mathews*, 1 D. & C. 35.

Attestation to.

3. The attestation of the solicitor to a petition is as a guarantee that it is proper, not as security for costs. *Ex parte Cadby*, 1 Mont. 352.

4. Although a petition by a solicitor need not be attested, yet it must appear on its face that he is a solicitor. *Ex parte Barrow*, 1 Mont. 92.

5. An insufficient attestation is not waived by filing affidavits in answer. *Ex parte Hutchinson*, 1 Mont. 130.

6. The attestation must be to the name of the petitioner, not to the petition. *Ex parte Cracklow*, 1 Mont. 353.

See PRACTICE, 1 Mont. 516.

PREFERENCE.

Signature to.

7. The petition of a person in Ireland must be signed by the petitioner. *Ex parte Cumming*, 1 Mont. 206.

8. If a petitioner reside in Scotland, his signature is sufficient, and the petition need not be signed by an agent in England. *Ex parte Paul*, 1 Mont. 252.

See PRACTICE, 1 Mont. 517.

Service of.

9. Upon a petition by a creditor under 6 Geo. 4. c. 16. s. 14. to re-tax a solicitor's bill of costs, it is not necessary to serve the assignees. *Ex parte Payne*, 1 Mont. 455.

See PRACTICE, 1 Mont. 517.

Amending.

See PRACTICE, 1 Mont. 518.

Appearance on.

10. Rule as to striking out petitions if parties do not appear. 1 Mont. 456.

See COSTS.

POLICY OF INSURANCE.

See REPUTED OWNERSHIP.

PRACTICE.

1. The Court of Review will endeavour to adhere to the present practice in bankruptcy. D. per Cur. *Ex parte Say*, 1 D. & C. 32. See *Orders in Bankruptcy of 12th January 1832, ante*. Appendix, xxix.

2. Notice must be given of an application to be discharged from an attachment for nonpayment of costs, upon an order made under a commission afterwards superseded. *Ex parte White*, 1 D. & C. 39.

3. *Quære*, Whether the Court can, on motion, discharge a person attached for nonpayment of costs, pursuant to an order? *Ex parte White*, 1 D. & C. 39.

4. Notice must be given of an application to discharge an order. *Ex parte Lowe*, 1 D. & C. 43.

5. Rule as to serving purchaser, on an application to set aside a sale by the assignees. *Ex parte Shepley*, 1 Mont. 353.

See various points of Practice collected under head, PRACTICE, 1 Mont. 506, *et seq.*

PREFERENCE.

1. The reason of the rule respecting preference is, that all the creditors who have trusted to the general credit of the bankrupt should share his property equally. *Hunt v. Mortimer*, 10 B. & C. 46. D. Littledale, J.

2. To constitute a fraudulent preference two things must concur: *first*, insolvency in the trader; *secondly*, a voluntary payment or transfer by him. D. Littledale, J. *Hunt v. Mortimer*, 10 B. & C. 46.

3. The whole doctrine of fraudulent preference has arisen rather by the contrivance of courts of law than on the language of the bankrupt acts. D. Tindal, Chief Justice. *Cook v. Rogers*, 7 Bing. 438.

4. Notwithstanding a threat, the motives and state of mind of the debtor at the time of payment may properly be left to the jury, upon a question whether a payment is voluntary or compulsory. *Cook v. Rogers*, 7 Bing. 438.

5. If a trader in desperate circumstances, who has several writs out against him, upon one of which he has been arrested and bailed,

PROOF OF DEBT.

receive a sum of money for some property he has sold to meet immediate exigencies; and a creditor, who has before threatened to arrest him if a bill is not paid when due, again threatens to arrest both him and his father; and on the next day he says, "he will be fooled no longer;" when the debtor, to benefit the creditor, pays the debt out of part of the money which he has received from the sale of his property, but the payment does not relieve him from his difficulties, or render it more probable that he shall continue his business; and on the evening of the same day he commits an act of bankruptcy, and the jury find that the payment was voluntary: the Court will not disturb the verdict. *Cook v. Rogers*, 7 Bing. 438; Gaselee, J. Dissent.

6. In a mixed case, in which the debtor has an object in favouring a particular creditor, but in which the creditor, before he knew of such a disposition on the part of the debtor, has urged and importuned him for payment, the jury must determine by what motive the debtor was actuated. *Cook v. Rogers*, 7 Bing. 438.

7. Where the bankrupt, before any act of bankruptcy, having a large order to execute for the East India Company, obtained from the defendants advances to enable him to execute it, upon an agreement that they should receive the amount of the order from the company, and repay themselves, which they accordingly did: Held, that it amounted to an equitable assignment of that particular fund, and was not a fraudulent preference, to which there must be both an insolvency in the trader and a voluntary payment or transfer by him. *Hunt v. Mortimer*, 10 B. & Cr. 44.

PROOF OF DEBT.

1. The proving against the principal is not an election not to proceed against the surety. *Ex parte Hughes*, 5 B. & A. 482.

2. If a creditor, through accident, omits to prove at the final dividend, he may be permitted to prove without disturbing any payments made by the assignees, and placing the creditors, not paid, in the same situation as if he had originally proved. *Ex parte Day and Cooper*, 1 Mont. 212.

3. A joint creditor took, as security for his debt, an equitable mortgage on the property of one of the partners, who died; the other then became bankrupt. Held, he might prove and also retain his security. *Ex parte Bowden*, 1 Dea. & Ch. 135.

4. An annuity creditor, who has a policy of insurance as security, cannot prove without sale of the security. *Ex parte Tierney*, 1 Mont. 78.

5. A trader, on his marriage, having given to trustees a bond for 3,000*l.* to be settled on himself for life, remainder to his wife and children, the trustees, upon his bankruptcy, are entitled to prove for the whole sum secured, and to retain the dividends during the life of the bankrupt, until the whole sum is made up. Overruling *Stratton v. Hull*, 2 Bro. c.c. 489. *Ex parte Turpin*, 1 Mont. 443. S. C. 1 Dea. & Ch. 121.

6. If one of three executors become bankrupt, having assets in his hands, the others may prove against his estate. *Ex parte Brown*, 1 Dea. & Ch. 118.

7. Where a petition to prove is not necessary, the petitioner must pay the costs. See *ex parte Rodgers*, 1 D. & C. 38.

8. An affidavit to prove a foreign debt must be attested by a notary abroad. *Ex parte Moens*, 1 Mont. 15.

PROOF OF DEBT.

9. A creditor who proves his whole debt, and exhibits a mortgage for a part, and then receives a dividend, forfeits the mortgage. *Ex parte Eggington*, 1 Mont. 72.

10. A creditor who has a bond may apply it in payment of part, and prove for the residue. *Ex parte Amphlets*, 1 Mont. 77.

11. If proof is rejected, from the creditor's inability through accident to produce the security, the Court will order the dividend to be opened, immediate notice to the assignees to suspend payment having been given. *Ex parte Barclay*, 1 Mont. 127.

See DEBT PROVEABLE.

PROCEEDINGS.

If a true bill for perjury be found against the solicitor to a commission, who made an affidavit in opposition to a petition to supersede, and it be necessary to produce the commission, proceedings, and the original affidavit at the trial, the Court will order the solicitor to deposit them at the Secretary of Bankrupts' office, and to be produced. *Ex parte Tipton*, 1 Mont. 214. *See Orders in the Court of Bankruptcy of January 12, 1832.*

PROPERTY ASSIGNABLE.

1. If the proprietor of shares in a mining company has them entered in the name of a third person, the legal interest is not in the proprietor, but in the third person. *Dawson v. Rishworth*, 1 Barn. & Adol. 576.

2. Where, by the contract between the bankrupt and vendors at a foreign port, the latter agreed to supply a cargo of timber, to be paid for by a bill at three months,

which was duly accepted, but afterwards dishonoured; and during the voyage the ship and cargo were so much injured by stranding, that the bankrupt gave notice of abandonment, which the defendants, the underwriters, refused to accept; after which the vendors took possession of the goods, and gave notice to the underwriters not to pay the loss on the cargo except to their order: Held, that after the stoppage *in transitu* the bankrupt had no property or insurable interest in the goods insured, and that his assignees could not support the action against the underwriters. *Clay v. Harrison*, 10 B. & Cr. (K.B.) 99.

3. If a testator leave two annuities of 20*l.* a year each to two females; and, upon one of the devisees marrying during the life of the testator, he, by a codicil, leave her annuity for her sole and separate use; and the other annuitant marry after his death, without any condition attached in the will to her annuity; it passes to the assignees under a commission against her husband. *Count v. Ward*, 7 Bing. 608.

4. It seems to have been supposed that the assignees are not entitled to a debt which accrued to the bankrupt in respect of his personal labour. *Crofton v. Poole*, 1 B. & Ad. 568.

5. If by marriage settlement the husband took an estate for life, with power of appointment to children, remainder to trustees to preserve, &c., remainder to children in tail in default of appointment, remainder to husband in fee in default of issue, and the husband become bankrupt, and all his property is conveyed in the usual way by bargain and sale to his assignees, and the bankrupt afterwards execute an appointment to his son in fee after his own life estate, and the assignees sell the

PROPERTY ASSIGNABLE.

life estate to the bankrupt's mother, the son takes nothing under the appointment, but is entitled to an estate tail under the original settlement. *Bahum v. Mee*, 7 Bing. 695.

6. If the wife of a bankrupt has an interest in a legacy, and the assignees file a bill to compel payment, and the husband dies before any decree is made, the widow, and not the assignees, is entitled to the legacy. *Pearce v. Thornby*, 2 Sim. 167.

7. If personal estate is left to a woman, subject to a life interest, and she marry a trader who becomes bankrupt, and the tenant for life and the wife die after the bankruptcy, the assignees are entitled to the legacy. *Ripley v. Wood*, 2 Sim. 165.

8. A supplemental order directing payment of money into court is not a judgment within 6 Geo. 4. c. 16. s. 108., but a specific equity upon the fund, protecting it for the parties ultimately entitled, against the assignees under a bankruptcy taking place between the order and the decree. *Hitchins v. Congreve*, 1 Mont. 225.

9. If a lease contains a condition that it shall be forfeited if seized in execution, and upon an execution issuing the lessor re-enter, and a commission of bankruptcy issue against the lessee, the lessor is entitled to the emblements. *Davis v. Eyton*, 7 Bing. 154.

10. If goods are housed in a trader's name at the wharf, and the trader give a delivery order to a purchaser, which is lodged with the wharfinger, and the goods remain in the wharfinger's books in the trader's name, on whom the rent is charged, but to any inquiry to whom the goods belong the answer would have been that they were the property of the purchaser, they are not in the reputed ownership of the

trader. *Tucker v. Ruston*, 2 Car. & P. 86.

11. A bill of exchange, given in payment to a person who becomes bankrupt after it is delivered, but before it is due, is a valid payment. *Bennett v. Spackman*, 1 Carr. & P. 274.

12. A. having two pipes of wine lying in a bonded warehouse, in the name of B., who had given bond for the duties, sold them to C., and gave him a delivery order; and it was at the same time agreed that C. should pay the duties. B. was called upon, and paid the duties, and took the wines to his own cellar. A. refused the amount of duties to B. C. never required B. to transfer the wines to his own name; but he took away one pipe, and paid warehouse rent to B. C. afterwards became a bankrupt. B., at A.'s request, may hold the pipe until the duties are paid. *Winks v. Hassall*, 9 B. & C. 372.

13. If a creditor, who has a lien upon goods before an act of bankruptcy take place, take the goods in execution after an act of bankruptcy, he waives his lien, although the goods are sold to the plaintiff under the execution, and are never removed from the premises; and the assignees under a commission against the debtor are entitled to the goods. *Jacobs v. Latour*, 5 Bing. 130. See *Bailey v. Culverwell*, 8 B. & C. 454.

14. If a promissory note, indorsed by a surety, be delivered by the maker to a creditor, and the debtor, being unable to discharge it when due, sell goods to the creditor, and the note is returned in part payment, but at the time of the sale of the goods the maker has committed an act of bankruptcy, and they are recovered back by the assignees, the creditor may, on a

REFERENCE.

bill filed, recover from the indorser. *Gregory v. Bessell*, 6 Madd. 186.

15. When it is the custom to detain until certain disbursements are paid, a delivery of part is not a delivery of the whole. *Holderness v. Shackels*, 8 B. & C. 618.

16. A payment by a trader, after he has committed an act of bankruptcy, and when he contemplated the probability of bankruptcy, is not a preference, if made to enable him to stand his ground. *Vacher v. Cocks*, 1 B. & Adol. 145.

17. If an army agent agrees with his bankers to pay over to them on receipt the sums which usually come to his hands half-yearly from government, on account of the regiments, upon his banker's giving him permission to draw upon them, it being his custom to advance money to his customers on their pay before it was received, and he draw accordingly, and after he has committed a secret act of bankruptcy he pay over to his bankers government remittances, in pursuance of the arrangement, and to enable him to go on in his business for a time, it is a preference. *Vacher v. Cocks*, 1 B. & Ad. 145.

18. If three persons, of whom one is ship's husband, are interested as part owners of a ship, and in the proceeds of a whale fishery in which it is employed; and when each part owner's share is weighed it is placed separately in a warehouse, and the particular casks containing his oil are marked with his initials; and after the division it is the practice for the foreman to deliver to the separate order of each part owner the oil belonging to him, unless previous to the delivery he receives a notification from the ship's husband that the part owner's share of the disbursement has not been paid to him; if, after the arrival of a

cargo, and after the weighing and marking in usual course, one of the part owners has delivered to his order 20 tons of oil; part of his share of 29 tons which was allotted to him, when the foreman receives orders not to deliver the residue, as the part owner's share of the disbursements is not paid, and the part owner becomes bankrupt and indebted to his copartners, the part owners have a lien on the nine tons. *Holderness v. Shackels*, 8 B. & C. 615.

19. In a marriage settlement, where part of the trust fund consists of the wife's fortune, a limitation to the husband until bankruptcy, and upon that event for the benefit of the wife and children, is valid to the extent of the wife's proportion of the fund. *Lester v. Garland*, 1 Mont. 471.

PROVISIONAL ASSIGNMENT.

Choses in action pass by a provisional assignment. *Moult v. Massey*, 1 B. & Ad. 648.

PUIS DARREIN CONTINUANCE.

See CERTIFICATE.

R.

REFERENCE.

One of the judges of the Court of Review will take references in all cases where it has hitherto been the practice to refer to a Master in Chancery. D. per Cur. Ex parte *Jeffery*, 1 Dea. & Ch. 206.

RENEWED COMMISSION.

REGISTRATION.

The want of registration of a conveyance does not leave the property in the reputed ownership of the mortgagor. *Ex parte Coles*, 1 D. & C. 100.

Seems strange that such a question should have been agitated.

RELATION.

1. A fraudulent deed, concerted between the petitioning creditor and the bankrupt, cannot be used to invalidate a payment made after notice of the execution of the deed. *Burbridge v. Watson*, 4 C. & P. 170.

2. If the payment of a bill is made after an act of bankruptcy, the burthen of showing that it is a *bond fide* payment is cast upon the receiver. *Bagnall v. Andrews*, 7 Bing. 223.

3. The assignees cannot, as it seems, invalidate by relation to act of bankruptcy anterior to the petitioning creditor's debt. *Ward v. Clarke*, 1 Mood. & M. 497.

4. Assignees cannot recover in trover goods delivered upon a transaction which the bankrupt himself could not impeach, unless the delivery is subsequent to an act of bankruptcy after a petitioning creditor's debt. *Ward v. Clarke*, 1 Moody & M. 497.

RENEWED COMMISSION.

1. A renewed commission may issue for the bankrupt to surrender previous to superseding. *Ex parte Galpin*, 1 Mont. 207.

2. A renewed commission transfers all the commissioners' authority

to the new commissioners. *Ex parte Hill*, 1 Mont. 5.

3. If a commission is renewed to a distant place from where the majority of the creditors reside, and from where the original commission was worked, the Court will, for the convenience of the creditors, supersede such renewed commission, and renew it back to the original place. *Ex parte Waring*, 1 Mont. 216.

REPUTED OWNERSHIP.

1. If property be assignable by transfer tickets, the possessor of the tickets is the reputed owner of the property. *Ridout v. Lloyd*, 1 Mont. 103.

2. The assignment of a policy of insurance, without notice to the office, does not prevent the operation of the clause of reputed ownership. *Ex parte Colvill and Geddes*, 1 Mont. 110.

3. A letter to secretary of insurance office, in which writer says, "I am holder of the under-mentioned policies," and enquires what the office will give for them, is sufficient notice of an assignment. *Ex parte Stright*, 1 Mont. 502.

4. Canal shares, if deemed personal property, are within the clause of reputed ownership. *Ex parte the Lancaster Canal Company*, 1 Mont. 116.

5. Goods in the hands of an agent are not in the reputed ownership of the principal. *Ex parte Taylor*, 1 Mont. 240.

6. *Quære*, Whether fixtures, being utensils let by the usage of the trade with the house, are within the seventy-second section of 6 Geo. 4. c. 16.? *Ex parte Austin*, 1 Dea. & Ch. 207.

7. If, after a carriage is finished,

REPUTED OWNERSHIP.

the price is paid; but as the purchaser is going to Portugal, it is arranged that the carriage shall remain, free from expence, on the premises of the coachmaker, for six months or longer, till the purchaser returns to England, and his crest is painted upon the pannels and embossed upon the handles of the doors, and the carriage is placed in the front shop of the coachmaker; and while it is standing there the coachmaker sells it, and puts the new purchaser's crest upon it, but tells him at the time of the sale to whom the carriage belongs; and it is usual for coachmakers, when they have built a good carriage, to put it into their show-room previous to sending it home; it is not in the reputed ownership of the coachmaker. *Bartram v. Payne*, 3 Carr. & P. 176. See *Mucklow v. Mangles*, 1 Taunt. 318.

8. If a firm be possessed, as mortgagees, of real estate, which after the death of one member remains in the possession of the survivors, it is not in their reputed ownership. *Ex parte Taylor*, 1 Mont. 240.

9. If a firm consign goods to Hayti, which, after the death of one member, are returned, and a bill of lading from Hayti is sent to the holder of a bill of exchange dishonoured by the partnership, and the goods remain in the West India Docks, the goods, upon the bankruptcy of the survivors, are not in their reputed ownership. *Ex parte Taylor*, 1 Mont. 240.

10. If goods are purchased and paid for by a firm of four, on the joint account of themselves and two other firms, and one member of the firm of four die, and the goods are in the possession of one of the two firms, upon the bankruptcy of the three survivors the goods do not pass by reputed ownership to the

assignees of the survivors. *Ex parte Taylor*, 1 Mont. 240.

11. If one of four partners die, and the survivors compromise and obtain securities for a debt due to the original firm, and become bankrupts, the securities were in the reputed ownership of, and distributable among the creditors of, the three survivors. *Ex parte Taylor*, 1 Mont. 240.

J. C. S. and W. S., brewers and partners, admitted W. W. as a dormant partner. By the articles of partnership it was agreed that stock, plant, book debts, &c., of the old firm, should form part of the stock of the new partnership, and that W. W. should be paid 10% per cent. on the capital he advanced, and that he should not interfere, &c. The business was carried on, as before, in the names of J. C. S. and W. S. only till the new firm became bankrupt. Upon the petition of creditors of the old firm, some having notice of the dormant partner: Held, that all the personalty of the new firm were within the order and disposition of J. C. S. and W. S., and to be administered in bankruptcy as the separate estate of the two. *Ex parte Jennings*, 1 Mont. 45. Confirmed on appeal. *Ex parte Chack*, in the matter of *Starkie*, 1 Mont. 364, 456.

See REGISTRATION.

RETAINER.

See JURISDICTION, *Lord Chancellor's*.

S.

SCANDAL.

1. A petition to refer for scandal need not state the scandal; it may

SET-OFF.

be presented by the solicitor against whom the scandal is directed; and the parties to the original petition need not be served. Ex parte *Kirby & Nias*, 1 Mont. 68.

2. A petition to refer an affidavit for scandal and impertinence must be presented before the original petition is heard.

The person scandalized must petition. Ex parte *Pelham*, 1 Mont. 209.

SCRIVENER.

A scrivener is a person entrusted with the money of his employer, and who finds a borrower. Ex parte *Bath*, 1 Mont. 82.

SECOND COMMISSION.

Goods cannot be taken under a second commission against an uncertificated bankrupt, the second being void. *Nelson v. Cherril*, 8 Bing. 316.

SECRETARY OF BANKRUPTS.

Production of Papers by,
See PRACTICE, 1 Mont. 513.

SERVANT.

1. The workman of a coachmaker who worked by the piece, and received a specific sum for every job under separate and distinct contracts, and where there is no hiring for a specific time, are not servants within 6 Geo. 4. c. 16. s. 48. Ex parte *Grellier*, 1 Mont. 264.

2. Weekly labourers and workmen employed as excavators and bricklayers are not servants within

6 Geo. 4. c. 16. s. 48. Ex parte *Crawfoot*, 1 Mont. 270.

SERVICE OF PETITION.

See PETITION, *Service of*.

SET-OFF.

1. Section 50, as to mutual credits, applies only to debts or transactions which must end in debts. *Rose v. Sims*, 1 B. & Ad. 526.

2. If a debtor gives his acceptance to a creditor in discharge of his debt, and the creditor accepts for the debtor a bill; and the debtor, in consideration of the acceptance by the creditor, undertakes to indorse a bill drawn by him on a third person to the creditor, and he delivers such bill to the creditor without indorsing it; and the creditor becomes bankrupt, and his acceptance is dishonoured; and the assignees bring *assumpsit* against the debtor for not indorsing the acceptance of the third person; the defendant cannot set-off the amount of the dishonoured acceptance of the bankrupt as a mutual credit. *Rose v. Sims*, 1 B. & Ad. 521.

3. A set-off may, without pleading, be given in evidence to an action by the assignees; and such set-off may be so given in evidence either as to the whole or to part, with a tender for the remainder. *Wells v. Crofts*, 4 C. & P. 333.

4. A party has a right to set-off notes of a firm of bankers, taken by him after he knew that they had stopped payment, but before he knew that either of the partners had committed an act of bankruptcy; but he is not entitled to set off

SOLICITOR.

notes of such bankers taken by him after he knew that either of the partners of the bank had committed an act of bankruptcy. *Dixon v. Cass*, 1 B. & Ad. 343.

5. *Hawkins v. Whitten*, confirmed in *Dixon v. Cass*, 1 B. & Ad. 352. Bayley, J., saying, Lord Tenterden concurred in the judgment, although it was not pronounced by him.

6. A bill returned to a debtor after the bankruptcy of the creditor may be set off. *Collins v. Jones*, 10 B. & C. 784.

SIGNATURE TO PETITION.

See PETITION, *Signature to*.

SOLICITOR.

1. Neither the solicitor to the commission nor his partner may be assignees. Ex parte *Price*, 1 Mont. 259.

2. The solicitor to a judgment creditor should not act as commissioner. Ex parte *Shum*, 1 Mont. 454.

3. An attorney, unable from bodily infirmity to attend to be sworn in, allowed to be admitted on affidavit, sworn before a Master in Chancery. See *Orders in Bankruptcy*, 12 Jan. 1832. Ex parte *Swain*, 1 D. & C. 15.

4. Section 14 applies only to cases between the assignees and the estate. *Taylor v. M'Gaugan*, 4 C. & P. 96.

5. A solicitor to a commission may maintain an action for his bill, up to the choice of assignees, without a previous taxation by the commissioners. *Taylor v. M'Gaugan*, 4 C. & P. 96.

6. When an attorney is employed by one person to sue out a commission of bankrupt on the petition of

another person, the person so employing the attorney, and not the petitioning creditor, is the person liable to pay the attorney the costs of suing out the commission. *Pocock v. Russell*, 4 C. & P. 14.

7. *Quære*, If an attorney can guarantee the petitioning creditor against the costs of the commission, on condition of being employed as solicitor to the commission? *Gillett v. Rippon*, 1 Moody & Malk, 406; and see *Murray v. Reeves*, 8 B. & C. 421.

8. It has been ruled over and over again, that the petitioning creditor's solicitor has no lien for the proceedings for his bill. D. Ex parte *Shaw*, Jacob, 272.

9. *Quære*, Whether a bill of costs for business done under a commission of bankruptcy need be delivered signed a month before action brought? See *Crowder v. Davis*, 3 Young and J. 433, and *Hamilton v. Jones*, 4 M. & P. 868.

10. A solicitor to a commission may maintain an action for his bill of costs, up to the choice of assignees, without a previous taxation by the commissioners. *Fisher v. Filmer*, 5 Car. & Pay. 92.

11. When mortgaged property is sold, and the same solicitor is concerned for the assignees and the mortgagee, a separate solicitor should be appointed for the purposes of the sale. Ex parte *Rolfe* and *Milne*, 1 D. & C. 77.

See Costs.

STATUTES.

The 1 & 2 Gul. 4. c. 56. The Bankrupt Court Act. Appendix.

1 Gul. 4. c. 7. sec. 7. as to judgments. Appendix. p. 1.

SUPERSEDEAS.

SUPERSEDEAS.

Previous Commission.

1. Where a second commission issued against a person who had previously to the first commission compounded, the Court refused to supersede, because 15s. in the pound had not been paid under the first. *Ex parte Welsh*, 1 Mont. 276.

2. A third commission against a bankrupt who has not paid 15s. in the pound is void, and may be superseded on the petition of a person summoned to attend the commissioners as a witness. *Ex parte Lane*, 1 Mont. 12.

Consent of Creditors.

3. If a bankrupt is unable from illness to attend an adjourned third meeting, and the commissioners therefore adjourn the meeting, the Court will, upon the consent of all the creditors, supersede without another surrender. *Ex parte Norcott*, 1 Mont. 281.

4. On a supersedeas by consent, a creditor cannot privately stipulate for better terms than the other creditors. *Ex parte Ridley*, 1 Mont. 131.

5. A commission may be superseded, by consent, without surrender. *Ex parte Glynn*, 1 Mont. 124.

Estoppel.

6. The Court of Review will not hear a petition by the bankrupt to supersede a fiat until he has surrendered, notwithstanding the petition was presented before the forty-second day, and came on before the time for surrendering had expired. *Ex parte Drake*, 1 Mont.

7. *Quære*, What amounts to an acquiescence. *Ex parte Hill*, 1 Mont. 9.

8. The Court may supersede, not-

VOL.I.

withstanding a verdict in favour of the commission; and if a new trial is directed, may restrain proceeding for double costs, under 6 Geo. 4. c. 16. s. 44. *Ex parte Eager*, 1 Mont. 85.

9. A bankrupt cannot petition to supersede, on the ground of the insufficiency of the petitioning creditor's debt, a bill of costs, when he had lain by two years before he took any steps to get it taxed, though such taxation has reduced the debt below 100*l*. *Ex parte Hooper*, 1 Dea. & Chit. 117.

10. A commission will not be superseded if the bankrupt has acquiesced in its validity by signing a deed reciting the bankruptcy. *Ex parte Hall*, 1 Mont. 364.

General.

11. Where the petitioning creditor petitions to supersede, the bankrupt cannot petition for an assignment of the bond. *Ex parte Sylvester*, 1 Mont. 125.

12. In an action for maliciously suing out a commission, the adjudication of the commissioners does not in itself negative the want of probable cause. *Cotton v. James*, 1 Barn. & Adol. 128.

13. In an action for maliciously suing out a commission, evidence of facts upon which the act of bankruptcy was probably proved, but which facts do not amount to an act of bankruptcy, is sufficient to call upon the defendants to prove the affirmative. *Cotton v. James*, 1 Barn. & Adol. 128.

14. A petition lies to restrain a bankrupt from proceeding at law to supersede the commission. *Ex parte Hill*, 1 Mont. 9.

15. A petition to supersede, presented in the lifetime of the bankrupt, ordered to stand over on his death till his personal representa-

c c

SURPLUS.

tives, &c. were served. *Ex parte Leworthy*, 1 Mont. 54.

16. If, after drawing lots in the bankrupt office, it is discovered that two of the commissioners named by the party in whose favour the lot fell are creditors, the Court will supersede. *Ex parte Kemp*, 1 Mont. 257.

17. In an action for maliciously suing out a commission, it must be averred and proved that the commission was superseded; and if this fact is not proved the plaintiff ought to be nonsuited, although it is not averred in the declaration, and although the defendant has omitted to demur for the omission. *Whitworth v. Hall*, 2 Barn. & Adol. 695.

18. A petition by a creditor to supersede must state, not only that he *was* a creditor when the commission issued, but also that he *remains* a creditor when he presents his petition. *Ex parte Flight*, 1 Dea. & Ch. 78. S. C. *Practice*, 1 Mont. 515.

See RENEWED COMMISSION.

SURETY.

1. It seems that a surety is entitled to prove for damage sustained by him after the bankruptcy of his principal. *Perryman v. Steggall*, 8 Bing. 369. But see *ex parte Wilson*, 1 Rose, 137, *Van Sandor v. Causby*, 3 B. & A. 13. 2 Moor, 608.

2. If a creditor with a guarantee for part of his debt prove the whole of his debt, he can call upon the surety only for the difference between the whole debt secured and the amount of the dividend upon the part secured. *Bardwell v. Lydall*, 5 Moore & P. 334.

SURPLUS.

1. A bankrupt, having a power of appointment over money to be executed only by will, made his will, disposing of the property, and then became bankrupt, and afterwards obtained his certificate, and died without revoking his will. — Held, that the appointee under the will is a trustee for the creditors of the bankrupt, who became such after he had obtained his certificate *Tinney v. Andrews*, 6 Madd. 264.

2. Frequent discharges under the bankrupt laws are a great injury to the honest tradesman; to check them, the payment of 15s. is required. *D. Fowler v. Coster*, 10 B. & C. 433.

3. If a joint commission issue against three, and the joint estate is insufficient, and one partner pay the deficiency from his private estate, and there is a surplus on the separate estates of each of the others, the partner who paid such deficiency is entitled to such surplus before interest is paid to the separate creditors. *Ex parte Rix*, 1 Mont. 237.

4. A surplus of separate estate must be carried to deficient joint estate before payment is made on a voluntary bond. *Ex parte Spurrier*, 1 Mont. 246.

5. Where there is a surplus upon the estate of a firm of three, which is indebted to a firm of two, the creditors of the three are entitled to interest before the surplus is carried to the estate of the two. *Ex parte Ogle*, 1 Mont. 350.

See ASSIGNEES.

SURRENDER.

1. The commissioners cannot apply for an enlargement of the time to surrender. *Ex parte Froud*, 1 Mont. 3.

THIRD MEETING.

2. When the bankrupt is abroad, the time for his surrender will be enlarged. *Ex parte Dods*, 1 D. & C. 76.

3. Practice as to, 1 Mont. 506.
See SUPERSEDEAS. RENEWED COMMISSION.

T.

TAXATION OF COSTS.

See Costs, Taxation of.

THIRD COMMISSION.

A third commission against a bankrupt who has not paid 15s. in the pound is void, and may be superseded on the petition of a person summoned to attend the commissioners as a witness. *Ex parte Lane*, 1 Mont. 12.

THIRD MEETING.

1. If the barristers in a country commission are absent, an order may be obtained for the others to hold the third meeting. *Ex parte James*, 1 Mont. 454.

2. It has been said, that upon an indictment for concealment, it is not necessary to state the commission and proceedings with great particularity. *D. Park J. Rex v. Walters*, 5 Carr. & P. 140.

3. When the last examination is not completed, but the examination is adjourned *sine die*, it has been ruled that the bankrupt cannot be indicted for concealment. *Rex v. Walters*, 5 Carr. & Pay. 139.

4. It has been ruled that parol evidence cannot be given of what the bankrupt says in an examination

of him before the commissioners. *D. Park J. Rex v. Walters*, 5 Carr. & P. 141.

5. An order to enlarge the time for surrender is upon the application of the bankrupt, of course, if made six clear days before the day for surrender, notwithstanding there have been previous orders for enlargement obtained by a creditor. *Ex parte Rose*, 1 D. & C. 37.

TITLE DEEDS.

The rule that a purchaser for a valuable consideration, without notice, cannot be compelled to discover his title deeds, does not extend to the mortgage or purchase deed itself. *Ex parte Caldecott*, 1 Mont. 55.

TRADER.

The wife of a convict sentenced to transportation may be a trader, although the husband is only on board the hulks, and she has occasional intercourse with him. *Ex parte Franks*, 7 Bing. 763.

TRADING.

Shareholders of a steam packet are not traders. *Ex parte Wiswold and Duncan*, 1 Mont. 263.

TRANSITU.

If goods are bought by an agent, on his own credit, he may, before they come to the possession of the principal, stop them, to protect himself. *Hawkes v. Dunn*, 1 Tyr. 416.

UNCERTIFICATED BANKRUPT.

TRANSFER TICKETS.

Where, on the bankruptcy of a trustee, one person is solely entitled to all the trust estate, the court will, upon petition, under 16 Geo. 4. c. 16. s. 79., order the bankrupt to deliver up and transfer it to such person without a new trustee. Ex parte *Hancox*, 1 Mont. 247.

See REPUTED OWNERSHIP.

U.

UNCERTIFICATED BANKRUPT.

1. A commission against an uncertificated bankrupt is a nullity. *Phillips v. Hopwood*, 1 B. & Ad. 441.

2. In an action by an uncertificated bankrupt for the payment of a sum which the defendant has paid to the assignees, the adjudication of bankruptcy, with the assignment, and proof that the plaintiff passed his examination and endeavoured to obtain his certificate, is sufficient evidence of the bankruptcy. *Crofton v. Poole*, 1 B. & Ad. 568.

3. If, after an uncertificated bankrupt has sued out a latitat, and the

defendant, before declaration, pay the debt to the assignees, this payment may be given in evidence under the general issue. *Crofton v. Poole*, 1 B. & Ad. 568.

4. If a furniture broker remove goods, and in the course of his business he employs several men and vans, and provides and sells goods, he is not using merely his personal labour. *Crofton v. Poole*, 1 B. & Ad. 568.

5. If the assignees reject a debt, it cannot be recovered by the bankrupt. *Hilary v. Morris*, 5 Car. & Pay. 6.

V.

VALID CONVEYANCE.

1. A transfer made on the eve of bankruptcy, from the fear of a criminal process, is valid. Ex parte *De Tastet*, 1 Mont. 138-150.

W.

WARRANTS.

Blank warrants deprecated. Ex parte *Hall*, 1 Mont. 5 in note.

END OF THE VOLUME.

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